March 25. 1891 Filed.

139-560

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~1014~~. ~~655~~ ~~362~~ 90 12

THE SELMA, ROME AND DALTON RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 25, 1886.

that the plaintiff could not recover if such were his position. The question of negligence under such circumstances belonged exclusively to the jury.

The eighth prayer seems to have been framed with some view of presenting the proposition that if the plaintiff voluntarily assumed to perform some dangerous office as the servant of the defendant, and while so acting sustained an injury, he was entitled to recover; but he does not in his prayer suggest that the injury was a consequence of his so acting or that by so acting he placed himself in a position of danger to which he would not otherwise have been exposed. The concurrence of two things is widely different from the relation of two things to each other as cause and effect. In another aspect of the prayer it may have been meant to convey the idea that if the plaintiff voluntarily and knowingly placed himself in a situation of danger and by reason of so doing was injured he cannot recover. But regarding the prayer in either way it is so defective in structure, so obscure, and so calculated to mislead a jury that the Court had no alternative but to reject it. Even were the prayer less objectionable in shape, there could hardly have been error in refusing it, as the Court in the instructions which were granted gave the jury all that was really necessary for them to judge properly of the testimony, and in cases of this class it is the better practice to abstain from attempts to multiply distinctions when there is no substantial variation of the principles involved.

We have carefully compared the general charge of the trial justice with the criticisms made upon it by counsel in argument; but we have been unable to find any just ground of exception, and no good purpose would be subserved by a detailed examination of the objections which were made.

We shall, then, for the reasons we have given, affirm the judgment of the Circuit Court.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I.—*Petition. Filed January* 25, 1883 (*under Article II, § 3 of Rules*).

In the Court of Claims. December Term, 1882.

THE SELMA, ROME AND DALTON RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 13417.

To the honorable the Court of Claims:

The claimant, The Selma, Rome and Dalton Railroad Company, respectfully shows to this honorable Court that it is a corporation organized, existing, and doing business under the laws of the States of Alabama and Georgia, and that as such it is the successor of the Alabama and Tennessee River- Railroad Company, late a corporation of those States, together with all the rights, franchises, privileges, property in possession, and choses in action which belonged to said Alabama and Tennessee River- Railroad Company; that it
2 has a claim against the United States for mail service performed on route No. 7147, in the State of Alabama, by said Alabama and Tennessee River- Railroad Company before said State of Alabama engaged in war against the United States, amounting, as it believes, to about the sum of ($6,000) six thousand dollars, but that it is unable to state its case with the requisite particularity without an examination of its original contract, which is on file in the Post Office Department; that it is unable to obtain a sufficient examination of said contract, the said Department having stated, on application of claimant's attorney in a similar case, that the Department would not furnish copies of papers on file "except on application of the proper officers of a regular court."

The claimant, therefore, prays this honorable Court to call on the Post Office Department and the Department of the Treasury for all necessary information and papers, as fully set forth in the motions herewith filed; and on receipt thereof the claimant will file its amended petition, in accordance with the rules of this Court.

GEORGE A. KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA:

George A. King, being duly sworn, deposes and says: I am attorney for the claimant in this —. I have read the above peti-
3 tion, and the matters therein stated are true to the best of my knowledge and belief.

GEO. A. KING.

Subscribed and sworn to before me this 25 day of January, 1883.
[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C't of Claims.

II.—*Amended Petition. Filed March* 3, 1883 (*under Art.* 2, *Sec.* 3 *of Rules*).

To the honorable the Court of Claims:

The claimant, The Selma, Rome and Dalton Railroad Company, respectfully shows to this honorable Court that it is a corporation organized, existing, and doing business under and by virtue of the laws of the States of Alabama, Mississippi, Kentucky, and Tennessee, and as such is the successor of the Alabama and Tennessee Rivers Railroad Company, late a corporation of said States and no longer in existence, with all the property in possession or action, right, privilege, and franchise of said company, including all right of action; that heretofore, to wit, on the 10th day of July, in the year 1858, said Alabama and Tennessee Rivers Railroad Company entered into a certain express contract with the United States
4 for the transportation of the mail between Selma, in the State of Alabama, and Talladega, in the State of Alabama, from the 1st day of July, 1858, to the 30th day of June, 1862, at and for a compensation of twelve thousand dollars a year, a certified copy of which contract is annexed to this petition and marked "Exhibit to Amended Petition" and made a part of the evidence in this case; that the said Alabama and Tennessee Rivers Railroad Company carried the mail under its said contract and in accordance therewith from the said 1st day of July, 1858, down to and including the 31st day of May, 1861, when the State of Alabama engaged in war against the United States, and said contract was discontinued by the United States; that neither this claimant nor any one for them has received any payment for the last five months of the period aforesaid, to wit, from the 1st day of January, 1861, to and including the 31st day of May, 1861, except the sum of eighty-four dollars and twenty cents ($84.20), nor any compensation for said discontinuance of the contract, and a balance of compensation is due claimant at the rate aforesaid, amounting to the sum of five thousand nine hundred and fifteen dollars and eighty cents ($5,915.80); that Congress, on the third day of March, eighteen hundred and seventy-seven, by an act entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-eight, and for other purposes," made an appropriation of three hundred and seventy-five thousand dollars, which was, by the said act, directed to be applied to the payment of this and other like claims; that by said act a claim accrued to this claimant to be paid the amount of five thousand nine hundred and fifteen dollars and eighty cents; that the Secretary of the Treasury and the Sixth Auditor thereof refused and neglected to distribute any portion of the said appropriation, but covered the whole of the same into the Treasury of the United States; that this claim has not been paid in
5 whole or in part by the Confederate States government, or by any government or pretended government of any State, or by the defendants, or by any government, corporation, or person whatsoever; that no action has been had on this claim in Congress

or by any of the departments otherwise than as herein set forth; that the claimant is the sole owner of this claim and the only person interested therein; that no assignment or transfer of this claim, or any part thereof or interest therein, has been made except as hereinbefore stated; that the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that the claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that the claimant believes the facts as stated in this petition to be true; and the claimant demands judgment for five thousand nine hundred and fifteen dollars and eighty cents ($5,915.80).

GEORGE A. KING,
Attorney for Claimant.

John W. Cameron, being duly sworn, deposes and says: I am attorney-in-fact of the claimant in this case. I have read the above amended petition, and the matters therein stated are true, to the best of my knowledge and belief.

JNO. W. CAMERON.

Subscribed and sworn to before me this 3d day of March, 1883.
[SEAL.] JOHN E. BEALL,
Notary Public.

6 *Exhibit to Amended Petition. W. P. D., 15 B.*

UNITED STATES OF AMERICA,
POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *March* 2, 1883.

I, T. O. Howe, Postmaster General of the United States of America, certify that the annexed is a true copy of the original contract now on the files of this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Post Office Department to be affixed at the city of Washington the day and year above written.

[SEAL.] T. O. HOWE,
Postmaster General.

Railroad Contract. Selma, Dallas Co., Ala.

No. 7147. $12,000 per annum.

This article of contract, made the 10th day of July, in the year one thousand eight hundred and fifty-eight, between the United States of America (acting in this behalf by their Postmaster General) and the Alabama and Tennessee Rivers Railroad Company, by Thomas A. Walker, its president, and Charles Lewis, George C. Phillips, and John W. Lapsley, as sureties, witnesseth:

That whereas the said railroad company has been accepted, according to law, as contractor for transporting the mail on route No.

7147, from Selma, Ala., by Burnsville, Plantersville, Randolph, Montevallo, Shelby Springs, Columbiana, Wilsonville, Kimulga, Childersburgh, and Mardisville to Talladega and back, six times a week, 100 miles, and further as road is completed, in railroad cars—residue four-horse coaches—at twelve thousand dollars per year for and during the term commencing the first day of July, in the year one thousand eight hundred and fifty-eight, and ending with the thirtieth day of June, in the year one thousand eight hundred and sixty-two: Now, therefore, the said Alabama and Tennessee Rivers Railroad Company, as contractor, and the said Charles Lewis, George C. Phillips, and John W. Lapsley, as sureties, do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves—

7 1st. That the mail (including British, Canada, and other foreign mails) shall be conveyed in a secure and safe manner, free from wet or other injury, in a separate and convenient car, or apartment of a car, suitably fitted up, furnished, warmed, and lighted, under direction of the Post Office Department, and to the satisfaction of the Postmaster General, or of his authorized special agent, at the expense of the contractor, for the assorting and safe keeping of the mails, and for the exclusive use of the Department and its mail agent, if the Department shall employ such agent; and such agent is to be conveyed free of charge. When there is no agent of the Department the railroad company shall designate a suitable person upon each train, to be sworn, to receive and take charge of the mails, and of way-bills accompanying and describing them, and duly deliver the same; and the mail shall be taken from and delivered into the post offices at the ends of the route, and also from and into the intermediate offices, provided the latter are not over one-quarter of a mile from a depot or station.

2d. That if the company shall run a regular train of passenger cars more frequently than is required by the contract to carry the mail, the same increased frequency shall be given to the mail, and without increase of compensation, and the like as to the increased speed of the mail trains, if desired by the Postmaster General.

3d. That the company shall convey, free of charge, all mail bags and post-office blanks, and also all accredited special agents of the Department, on exhibition of their credentials.

4th. That the company shall not, by itself nor by its agents, transmit, or be concerned in transmitting, commercial intelligence more rapidly than by mail, nor carry out of the mail letters and newspapers which should go by post, except letters in stamped envelopes and letters of the officers of the company exclusively on the business of the road.

5th. That in every case of failure to perform the trip (unless it is shown that the same was not caused by misconduct, neglect, or want of proper skill) there may be a forfeiture of the pay for the trip; and a failure to arrive at the end of the route, so as to lose the connection with a depending mail, shall be considered as equal to a whole trip lost, unless the detention or delay be the result of unavoidable causes.

8 6th. That the company shall be subject to fine for failure to take or deliver a mail or any part of a mail, for suffering the mail to be wet or otherwise injured or lost or destroyed, unless it shall appear that such failure or other incident, as aforesaid, was not caused by misconduct, neglect, or want of proper skill on the part of the company or its officers.

7th. That the company shall be answerable for the adequacy of the means of transportation, for the faithfulness, ability, and diligence of its agents, and for the safety, due receipt, and delivery, as aforesaid, of the mails.

8th. That the Postmaster General may dispense with the service entirely, if required by the public interest, he allowing one month's extra pay upon the amount deducted, or he may annul the contract without making such allowance for repeated failures of the contractors to perform any of the stipulations of the contract, for violating the post-office law, or disobeying the instructions of the Department.

9th. The said United States covenant with the said company to pay, as aforesaid, at the rate aforementioned, quarterly, in the months of May, August, November, and February, or in the preceding months, at the option of the Department:

Provided always that this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed the twenty-first day of April, in the year one thousand eight hundred and eight, entitled "An act concerning public contracts."

In witness whereof the said Postmaster General has caused the seal of the Post Office Department to be hereto affixed and has attested the same by his signature, and the said railroad company by its —, and their sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

August 14, 1858.

HORATIO KING, [SEAL.]
Acting Postmaster General.
ALABAMA AND TENNESSEE RIVER-RAILROAD CO.,
By THOS. A. WALKER, *Pres't.* [SEAL.]
CHARLES LEWIS. [SEAL.]
GEORGE C. PHILLIPS. [SEAL.]
JOHN W. LAPSLEY. [SEAL.]

Signed, sealed, and delivered by the Postmaster General in the presence of—
R. T. SPOTSWOOD.

And by the other parties in the presence of—
J. N. DAVIS,
As to Thos. A. Walker.
WM. H. EAGER, P. M.,
As to Charles Lewis.
CHARLES H. MILTON, P. M. at Shelby Springs,
As to George C. Phillips and John W. Lapsley.

I certify that the above-named Charles Lewis, George C. Phillips, and John W. Lapsley are good and sufficient sureties for the amount in the foregoing contract.

WM. H. EAGER,
Postmaster at Selma, Dallas Co., Alabama.

9 III.—*Traverse. Filed May* 25, 1883.

And now comes the Attorney General, in behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

10 IV.—*Findings of Fact. Filed June* 7, 1886.

This case having been heard before the Court of Claims, the Court, from the evidence, finds the facts to be as follows:

I.

The contract mentioned in the claimant's petition, and set forth in full in the exhibit thereto, was duly executed by both parties, as therein stated.

The Alabama and Tennessee Rivers Railroad Company carried the mails of the United States under the said contract continuously from January 1, 1861, to May 31, 1861. Said company only received ninety-five dollars and nineteen cents ($95.19) for the said service, and did not receive one month's extra pay for discontinuance of the service.

II.

The Legislature of Alabama passed the following act February 8, 1867:

An act approving the consolidation of the Dalton and Jacksonville Railroad Company with other companies therein named, and to authorize the consolidated company to adopt a name and charter, and to act under the same.

SECTION 1. Be it enacted by the Senate and House of Rep-
11 resentatives of the State of Alabama in General Assembly convened, That the consolidation of the Dalton and Jacksonville Railroad Company and the Georgia and Alabama Railroad Company, of the State of Georgia, with the Alabama and Tennessee Rivers Railroad Company, of this State, as agreed on by and between said companies, so as to form one consolidated railroad company for

the construction and use of a railroad to be constructed from Blue Mountain, in the State of Alabama, as a continuation of the Alabama and Tennessee Rivers railroad, by way of Rome, to Dalton, in the State of Georgia, be, and the same is hereby, ratified and approved, and the said consolidated company, acting by its board of directors, shall be, and is hereby, authorized and empowered to adopt as its corporate name and style the name and style of the Selma, Rome and Dalton Railroad Company, and to adopt as its charter the charter of the Alabama and Tennessee Rivers Railroad Company, as now existing, with its amendments, and under and by said name and style and charter so authorized may and shall have, possess, enjoy, and exercise all its lawful rights, functions, powers, and privileges, and shall be subject to all lawful liabilities and responsibilties incurred or contracted by said consoli-
12 dated company: Provided always, That nothing in this act shall be so construed as to release either of said companies from any obligation or liability incurred or contracted by them or either of them prior to their said consolidation.

Approved February 8, 1867.

The companies named in this act accepted its terms and consolidated under the name of the Selma, Rome and Dalton Railroad Company, which is the claimant in this case.

III.

The following general orders discontinuing the postal service in Southern and border States were issued by the Postmaster General under authority of the act of Congress approved February 28, 1861 (12 Stat. L, 177, 178):

Postal Service, Southern Section.

MAY 27TH, 1861.

Ordered, All postal service in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas to be suspended from and after the 31st inst. Letters for offices temporarily closed by this order will be forwarded to the Dead Letter Office, except those for Western Virginia, which will be sent to Wheeling.

Discontinuance of the Mail Service Entire in Middle and West Tennessee.

JULY 10TH, 1861.

Ordered, That the entire postal service, embracing post offices, post routes, and route agencies, in Middle and West Tennessee be discontinued from and after this date. No mails will be hereafter made up for any offices in those districts until such service shall be restored and notice given, nor will prepaid postage thence be recognized.

Order of the Postmaster General dated 21st December, 1861.

Being satisfied that the postal service cannot safely be continued or the post office revenues collected or the postal laws maintained on the foregoing (following) routes in the State of Missouri, discontinue mail service on the same in pursuance of the authority conferred by the act of Congress approved February 28th, 1861, till the same can be safely restored.

The routes embraced by the order are as follows: 10408, 11, 12, 1421, 93, 10535, 36, 39, 47, 48, 49, 51, 52, 59, 60, 65, 66, 67, 72, 74, 75, 10579, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 10598, 9, 10600, 1, 2, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 10622, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 40, 42, 43, 10644, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 62, 63, 65, 76, 10679, 80, 81, 82, 85, 86, 87, 88, 90, 91, 92, 93, 95, 10703, 9, 20, 21, 10723, 27, 30, 32, 44, 58, 65, 71.

The following special order was issued in regard to the aforesaid route of the Alabama and Tennessee Rivers Railroad Company:

13 May 27, 1861.—Discontinue service from and after 31st May, 1861, till the same can be safely restored (per P. M. General's printed notice of this date, acting under law of Congress of Feb. 28, 1861).

In accordance with the above orders said mail service of the United States was discontinued on said railroad after May 31, 1861.

Extract from Report of the Confederate Postmaster General April 29, 1861.

POST OFFICE DEPARTMENT,
MONTGOMERY, ALA., *April* 29, 1861.

To the President.

SIR: I have the honor to submit the following statement of the condition of the post office department:

* * * * * * * *

Soon after entering on my duties I received letters of inquiry from postmasters, mail contractors, and others as to whether they were to continue to act under their appointments and contracts as the officers and contractors of the Government of the United States, or were to hold themselves responsible to the government of the Confederate States. In reply to the inquiries of contractors I prepared and sent them circular letter No. 2, a copy of which is hereto annexed (marked Appendix D), advising them that this government would not interfere with existing contracts between the contractors and the Government of the United States until it should assume the entire control of its postal affairs, and that it would not assume any liability for the contracts of the United States. In answer to postmasters circular letter No. 3, a copy of which is also hereto annexed (marked Appendix E), was prepared and sent to all the postmasters in the Confederate States directing them to continue

to perform their duties, render their accounts, and pay over all moneys to the Government of the United States which might come into their hands as postmasters until this department should assume the entire control of the service.

These circulars contain a statement of the reasons which induced the department to issue them.

It was hoped this course would have beneficial effects by removing all doubts as to the duty for the time being of those engaged in the postal service, and by showing to the Government at Washington that so long as it continued to hold itself liable for the mail service in the Confederate States it should receive all the revenues derived from that service. It was supposed, too, that it was greatly to the interest of that country, as well as to the interest of those of our own, to avoid a sudden suspension of the postal communication between the people of the two countries, and to avoid being brought at once to practical non-intercourse, which it was supposed would occur if this department had been required to assume the control of the service before its organization, and before any time had been given to provide the means of passing the mails across the frontier. And when that policy was determined on it was not known that actual hostilities would occur; but it was then supposed to be possible that our separation from the United States might be peaceably effected, and that all questions relating to the public property and to pecuniary liability between the two countries might be settled by negotiation on terms of equality.

While that Government has not yet suspended the mail service in this, it is yet believed that its control of the service for some time past has been used more to annoy and harass the mail contractors and postmasters in the Confederate States than for the purpose of affording mail facilities, and with a view of rendering them discontented, if possible, with the existing political condition of the country. I have no power under existing laws to assume control of our postal service before the suspension of it by the United States. If I had possessed that power I should before this have exercised it. And now that active hostilities have commenced, and as we need not anticipate being separated from our sister Southern States, or having our correspondence with them interrupted for any great length of time by being under different governments, I recommend that the Congress give this department authority at once to assume the control of our postal service, and that it forbid the continuance of such service under the authority of the United States.

Extracts from Report of the Confederate Postmaster General 29 April, 1861.

In this connection I should say that it is not deemed advisable at this time to relet the mail service for the Confederate States, but it is thought better to continue existing contracts whenever it is agreeable to the contractors. The reasons for this are that it may be doubtful whether contracts could now be made extending beyond the duration of the provisional government, and to let them for a

time not extending beyond that would probably increase rather than diminish the cost of the service for such period. But by waiting until the permanent government shall go into operation to let new contracts the department will have gained time to thoroughly examine the present schedules of mail routes and to readjust them, so as greatly to abridge the present expense. It would be difficult if not impossible to do this in a satisfactory manner in time to make new contracts this summer; and if other States should be added to the confederacy during the existence of the provisional government, which is probable, this course will give the department more time and better opportunity to arrange satisfactorily the whole service; and if the power be given to discontinue and curtail the service in proper cases, the expense of the service can be greatly reduced during the year without reletting the contracts. A thorough examination of the service of the various States is now being made by the department for the purpose of ascertaining what routes may be discontinued and what curtailed with propriety, and also for ascertaining the number of routes the revenue of which do not equal one-third of their cost. This examination, so far as it has gone, shows that there are many of these unproductive routes; and it cannot be doubted that a proper regard for economy, and in some cases even for propriety, will require some of them to be wholly discontinued, and many others to be curtailed to a less expensive service. This report, embracing the contracts in the States of Alabama, Louisiana, Mississippi, and Texas, is herewith submitted (marked Appendix F). A similar report cannot now be made for the States of Florida, Georgia, and South Carolina, for the want of present information of the cost of the service in those States.

14 *Extract from the Report of the Confederate Postmaster General April 29th*, 1861.

APPENDIX D.

(Circular letter No. 2.)

POST OFFICE DEPARTMENT,
MONTGOMERY, ——, 1861.

SIR: The government of the Confederate States will not interfere with any existing contracts entered into between the Government of the United States and the present contractors until it assumes the entire control of its postal affairs. This course is rendered necessary by the utter impracticability of mixing the employés of the two governments in the same service.

The question as to whether the government of the Confederate States will assume any liability to present contractors before it assumes the control of our postal affairs involves the idea of liability on the part of this government for the obligations of the United States, which cannot be entertained by this department; but if the Government of the United States should abandon the mail service in the Confederate States before the department shall be organized

and ready to enter into new contracts, I am authorized to continue existing contracts provisionally, by proclamation, until new contracts can be entered into.

Very respectfully, JOHN H. REAGAN,
Postmaster General.

Extract from the Report of the Confederate Postmaster General, April 29th, 1861.

APPENDIX E.

(Circular letter No. 3.)

POST OFFICE DEPARTMENT,
MONTGOMERY, ——, 1861.

SIR: All postmasters and other employés in the postal service are directed to continue the performance of their respective duties as such, and render all their accounts and pay all moneys to the order of the Government of the United States as they have heretofore done, until the government of the Confederate States shall be prepared to assume the entire control of its postal affairs.

The congress of the Confederate States has, by an act approved March 15th, 1861, provided "that the postmaster general shall have power to issue circular instructions to the several postmasters and other officers still performing service under the appointment of the United States, in order to enforce the rendition of the proper accounts and payment of the moneys collected by them per account of the United States, until the postmaster general shall have issued his proclamation announcing that the former service is discontinued and is replaced by the new service organized under the authority of this government."

In order that you may be enabled to comply strictly with the foregoing direction, issued in conformity with the authority conferred by said act, your attention is specially directed to the regulations of the Post Office Department of the United States, embraced in chapters 19, 20, 21, 22, 23, and 26 of the volume of laws and regulations issued 15 May, 1859.

The post office department of the Confederate States will be organized as soon as practicable; but the causes of delay incident to its organization are such as to place it out of my power to determine definitely when the new service will be substituted for the old.

Any attempt to mix the employees of the two governments in the same service would be wholly impracticable, and no removals or appointments of postmasters or others in the postal service will be made by this department, nor will it receive returns relating to or moneys derived from the postal service until it shall assume the entire control of the service.

If the Government of the United States should cease to carry on this service before this department shall be organized and prepared to take charge of it, no great shock to the public interests will be produced by such a course, as the postmaster general is authorized

to continue provisionally, by proclamation, the present postmasters and others in the postal service in office, and to continue existing contracts for carrying the mails until new appointments and new contracts can be made.

We must regard the carrying of our mails at this time by that government as a great public necessity to the people of both governments, resulting from their past intimate, political, commercial, and social relations, and alike important to the preservation of the present interests of the people of both countries; and while that government, by its action, consults such considerations, our government and people should act with the same high regard for great public interests. Such a course on our part, springing from such motives, will preserve the character of our people without impairing the dignity of our government, and may lead to the transfer of our postal service from the control of the old to that of the new government with far less injury to the people of both than would necessarily flow from precipitate and inconsiderate action on the part of either.

You will please acknowledge the receipt of this circular.

I am, very respectfully, your obed. serv't,

JOHN H. REAGAN,
Postmaster General.

To —— ——, Esq., postmaster at ——.

15 *Extract from Report of the Confederate Postmaster General 27 Nov.*, 1861.

POST OFFICE DEPARTMENT,
RICHMOND, VA., *Nov.* 27, 1861.

SIR: I have the honor to submit the following statement of the condition of the business of the post office department:

On the 29th day of April last I had the honor of submitting to you a report of the condition and progress of organization of the post office department and of presenting a plan for the organization of its several bureaus and of the office of auditor of the treasury for the post office department, and of suggesting such changes and modifications in the laws relating to the postal service as our new condition required, and of asking for authority to assume the entire control of the postal service in the Confederate States.

Under the provisions of the first section of the act of Congress of May 9th, 1861, "to amend an act vesting certain powers in the postmaster general, approved March 15th, 1861," the requisite authority was given to him to issue his proclamation fixing a day on which he would assume the control of the postal service. Pursuant to that authority, the following proclamation was issued on the 13th day of May, fixing the first day of June for the commencement of the service, to wit:

"Whereas, by the provisions of an act approved March 15, 1861, and amended by the first section of an act approved May 9, 1861, the postmaster general 'is authorized, on and after a day to be

named by him for that purpose, to take the entire charge and direction of the postal service in the Confederate States,' and all conveyance of mails within their limits from and after such day, except by authority of the postmaster general, is hereby prohibited:

"Now, therefore, I, John H. Reagan, postmaster general of the Confederate States of America, do issue this my proclamation notifying all postmasters, contractors, and special and route agents in the service of the post office department and engaged in the transmission and delivery of the mails, or otherwise in any manner connected with the service within the limits of the Confederate States of America, that on and after the first day of June next I shall assume the entire control and direction of the postal service therein. And I hereby direct all postmasters, route agents, and special agents within these States, and now acting under the authority and direction of the Postmaster General of the United States, to continue in the discharge of their respective duties, under the authority vested in me by the congress of the Confederate States, in strict conformity with such existing laws and regulations as are not inconsistent with the laws and constitution of the Confederate States of America, and such further instructions as may hereafter be issued by my direction. And the said postmasters, route agents, and special agents are also required to forward to this department, without delay, their names, with the names of the offices of which they are postmasters (giving the State and county), to be directed to the 'chief of apointment bureau, post office department, Montgomery, Alabama,' in order that new commissions may be issued under the authority of this government; and the postmasters are hereby required to render to the Post Office Department at Washington, D. C., their final accounts and their vouchers for postal receipts and expenditures up to the 31st day of this month, taking care to forward with said accounts all postage stamps and stamped envelopes remaining on hand belonging to the Post Office Department of the United States in order that they may receive the proper credits therefor in the adjustment of their accounts; and they are further required to retain in their possession, to meet the orders of the Postmaster General of the United States for the payment of mail service within the Confederate States, all revenue which shall have accrued from the postal service prior to the said 1st day of June next.

"All contractors, mail messengers, and special contractors for conveying the mails within the Confederate States, under existing contracts with the Government of the United States, are hereby authorized to continue to perform such service under my direction from and after the day last above named, subject to such modifications and changes as may be found necessary, under the powers vested in the postmaster general by the terms of said contracts and the provisions of the second section of an act approved May 9th, 1861, conformable thereto. And the said contractors, special contractors, and mail messengers are required to forward without delay the number of their route or routes, the nature of the service thereon, the schedule of arrivals and departures, the names of the offices supplied, and the amount of annual compensation for present

service, together with their address, directed to the 'chief of the contract bureau, post office department, Montgomery, Alabama.'

"Until a postal treaty shall be made with the Government of the United States for the exchange of mails between that Government and the government of this confederacy postmasters will not be authorized to collect 'United States postage on mail matter sent to or received from those States; and, until supplies of postage stamps and stamped envelopes are procured for the prepayment of postage within the Confederate States,' all postages must be paid in money, under the provisions of the first section of an act approved March 1st, 1861.

"Given under my hand and the seal of the postoffice department of the Confederate States of America, at Montgomery, Alabama, the 13th day of May, in the year 1861.

"JOHN H. REAGAN,
"*Postmaster General.*"

In accordance with the above-cited circular and proclamation the Confederate government took charge of the postal service on said Alabama and Tennessee Rivers railroad June 1, 1861.

16 IV.

Presumption of Payment by the Confederate States.

An act to collect, for distribution, the moneys remaining in the several post offices of the Confederate States at the time the postal service was taken in charge by said government.

The congress of the Confederate States of America do enact, That it shall be the duty of the postmaster general to collect all moneys due from the several postmasters within the Confederate States, and which they had not paid over at the time the Confederate States took the charge of the postal service, and the several postmasters are hereby required to account to the general post office of this government under the same rules, regulations, and penalties that were prescribed by the law under which said moneys were received.

SEC. 2. The moneys so received shall be kept separate and distinct from the other funds of the post office department, and shall constitute a fund for the *pro rata* payment of claims for postal service which accrued before the postmaster general took charge of the postal service in the States respectively comprising this confederacy, as may hereafter be provided.

SEC. 3. It shall be the duty of the postmaster general to make proclamation that all persons who are citizens of the Confederate States of America, and who may have rendered postal service in any of the States of this Confederacy, under contracts or appointments made by the United States Government before the Confederate States government took charge of such service, shall present their claims to this department, verified and established according to such rules as he shall prescribe, by a time therein to be set forth, not less than six months, and requiring the claimant to state, under

oath, how much has been and the date of such payments on account of the contract or appointment under which said claim occurred, and what fund or provision has been set apart or made for the further payment of the whole or any portion of the balance of such claim by the Government of the United States or of any of the States; and they shall also state, on oath, whether they performed fully the service according to their contracts or appointments during the time for which they claim pay, and, if not, what partial service they did perform, and what deductions have been made from their pay, so far as they know, on account of any failure, or partial failure, to perform such service; and the postmaster general shall, as soon as he shall have collected such moneys from said postmasters, and ascertained the amount of claims against the post office department, and the amount received respectively by the claimants as aforesaid, and the provision, if any, for future payment, make a report of the same, so that future action may be taken thereon as respects the distribution.

SEC. 4. All claims for postal service required to be presented by this bill shall be barred as against this fund unless presented within six months after the proclamation of the postmaster general shall have been made.

Approved August 30, 1861.

An act to provide for the payment of sums ascertained to be due for postal service to citizens of the Confederate States by the postmaster general.

The congress of the Confederate States of America do enact, That the postmaster general of the Confederate States do proceed to pay to the several persons, or their lawfully authorized agents or representatives, the sums respectively found due and owing to them for postal service rendered in any of the States of this confederacy under contracts or appointments made by the United States Government before the Confederate States government took charge of such service, as the said sums have been credited and ascertained by him under the provisions of an act entitled "An act to collect for distribution the moneys remaining in the several post offices of the Confederate States at the time the postal service was taken in charge by said government," approved the thirtieth day of August, 1861; but the sums authorized by this act to be paid are only the balances found due after all proper deductions shall have been made on account of previous payments made by the United States, or any of the States, or of available provisions made in whole or in part for such payment by said Government, or of any of the States, and after making all proper deductions for failures or partial failures to perform the service according to their several contracts or appointments during the time for which they claim pay; Provided, That the provisions of this act shall only extend to loyal citizens of the Confederate States.

Approved September 27, 1862.

V.

At an early day after the passage of the sundry civil appropriation act of March 3, 1877 (19 Stats. L., 344, 362, ch. 105), which contains a certain appropriation of $375,000, referred to in the claimant's petition, the Secretary of the Treasury issued an order that no payments should be made out of that appropriation until all claims covered by its terms should have been received and adjusted, and if the appropriation should prove insufficient they should then be paid *pro rata*. In consequence of this order no claims were adjusted within two years of the date of the act, and the appropriation was therefore covered into the Treasury under the requirement of section 5 of the legislative, executive, and judicial appropriation act of June 20, 1874. (18 Stats. L., ch. 328, p. 85.)

VI.

17 The convention of the State of Alabama passed an ordinance of secession from the United States on the 11th day of January, 1861; and on the following 4th of February a convention of such of the Southern States as had up to that time seceded assembled at Montgomery, Alabama, and on the 9th of the same month adopted a provisional government for the "Confederate States of America," including Alabama, which participated in the convention.

The parties to this case have agreed that the work entitled "War of the Rebellion—Official Records of the Union and Confederate Armies," now in course of publication by the Government of the United States, may be referred to in the hearing of this cause in this Court, and on appeal in the Supreme Court, in the same manner as if the same had been incorporated in these findings.

The above is agreed to as the findings of facts in this case.

GEORGE A. KING,
Att'y for Claimant.
FELIX BRANNIGAN,
Assistant Attorney for Defendants.

18 Stipulation as to additional request for findings of fact, namely: That said Alabama and Tennessee Rivers Railroad Company carried the mails for the Confederate States government between Selma and Talladega, in the State of Alabama, in the year 1861, and that said mail service commenced immediately after said company ceased to carry the mails of the United States.

Agreed to by—

GEORGE A. KING,
Attorney for Claimant.
FELIX BRANNIGAN,
Ass't Attorney for Defendants.

ROBERT A. HOWARD,
Assistant Attorney General.

Conclusion of Law.

And upon the foregoings findings of fact the court decides as conclusion of law:

The petition of the claimant should be dismissed for the reasons set forth in the opinion of this court in the case of Blount's administrator (21 C. Cl's R.)

19 V.—*Judgment Dismissing Petition.*

THE SELMA, ROME AND DALTON RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 13417.

At a Court of Claims held in the city of Washington, on the 7th day of June, 1886, the judgment was ordered to be entered for the defendants, and that the petition of the said claimant, The Selma, Rome and Dalton Railroad Company, be dismissed.

20 VI.—*Application of Claimant for and Allowance of Appeal.*

THE SELMA, ROME AND DALTON RAILROAD COMPANY
v.
THE UNITED STATES. } No. 13417.

From the judgment rendered in the above-entitled cause on the 7th day of June, 1886, in favor of the defendants, the claimant, the Selma, Rome and Dalton Railroad Company, by its attorney of record, George A. King, on the 22d day of June, 1886, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. KING,
Attorney for Claimant.

Filed June 22, 1886.

At chambers. Allowed June 22, 1886.
WILLIAM A. RICHARDSON,
Chief Justice.

21 In the Court of Claims.

THE SELMA, ROME AND DALTON RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 13417.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court dismissing the petition, [and] of the application of the claimant for an allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of September, 1886, at Washington city.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 1014. The Selma, Rome and Dalton Railroad Company, appellant, *vs.* The United States. Filed September 25, 1886.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 1014.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM W. BELKNAP,
Attorneys for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of September, 1886, at Washington city.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 1014. The Selma, Rome and Dalton Railroad Company, appellant, *vs.* The United States. Filed September 25, 1886.

IN THE

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No. 1014.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM W. BELKNAP,
Attorneys for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1886.

THE SELMA, ROME, AND DALTON RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES.

No. 1,014.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This suit was commenced by the appellant in the Court of Claims by a petition (p. 1) filed January 25, 1883, and more fully stated in an amended petition (pp. 2, 3) filed March 3, 1883, to recover payment for carrying the United States mails between Selma and Talladega, in the State of Alabama, from January 1, 1861, to May 31, 1861.

The suit was based upon the following clause in the sundry civil appropriation act approved March 3, 1877, 19 Stat. L. 344, 362:

"That the sum of three hundred and seventy-five thousand dollars, or so much thereof as may be necessary, be appropriated to pay the amount due to mail contractors for mail service performed in the State of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Mis-

souri, North Carolina, South Carolina, Texas, Tennessee, Virginia, and West Virginia in the years eighteen hundred and fifty-nine, eighteen hundred and sixty, eighteen hundred and sixty-one, and before said States respectively engaged in war against the United States; and the provisions of three thousand four hundred and eighty of Revised Statutes of the United States shall not be applicable to the payments therein authorized: *Provided*, That any such claims which have been paid by the Confederate States Government shall not be again paid."

Section 3,480 of the Revised Statutes herein referred to is the one which makes it unlawful for any officer to pay any claim against the United States which accrued prior to April 13, 1861, in favor of any person who promoted, encouraged, or sustained the late rebellion, or in favor of any person who was, during such rebellion, not known to be opposed thereto and distinctly in favor of its suppression.

The findings of fact (p. 6) show that the Alabama and Tennessee Rivers Railroad Company on July 20, 1858, entered into contract (pp. 3–6) with the United States in the usual form to carry the United States mail from Selma, Alabama, to Talladega, Alabama, and back at $12,000 a year for and during the term commencing July 1, 1858, and ending June 30, 1862. The contract also contained the usual stipulation for one month's extra pay in case of the discontinuance of the service by the Postmaster-General, as follows (p. 5):

"That the Postmaster-General may dispense with the service entirely if required by the public interest, he allowing one month's extra pay upon the amount deducted, or he may annul the contract without making such allowance for repeated failures of the contractors to perform any of the stipulations of the contract, for violating the post-office law, or disobeying the instructions of the Department."

The findings further show (p. 6) that during the period for which payment is claimed the Alabama and Tennessee

Rivers Railroad Company carried the mails of the United States under the contract, and only received $95.19 for said service, and did not receive one month's extra pay for its discontinuance, which was ordered by the Postmaster-General.

The Legislature of Alabama authorized the Alabama and Tennessee Rivers Railroad Company to consolidate with such others as it might think proper, and to change its name for such other as it might adopt, by an act approved February 20, 1866, as follows (Acts of Alabama, 1865–'66, pp. 340–345):

No. 222.]

AN ACT to amend certain sections of the charter and amended charter of the "Alabama and Tennessee River Railroad Company," and to enlarge the powers of said company.

* * * * * *

SEC. 3. *Be it further enacted*, That said railroad company, acting by their board of directors, shall have the power and right to connect their railroad, or any portion thereof (including the road or roads which may be constructed under the provisions of this act), with the railroad or roads of any other company in the State, or any other State, on such terms as may be agreed with the company or companies owning or controlling the road or roads which may be connected with; and may unite and consolidate their railroad, or any portion thereof (including the road or roads which may be constructed as aforesaid), and their stock and franchise, or any portion thereof, with the road or roads and stock and franchise, or any portion thereof, of any other railroad company or companies in this or any other State, in such terms as may be agreed on by and with the interested and contracting companies. And the said Alabama and Tennessee River Railroad Company shall have power to purchase and own the stock and railroad and appurtenances and franchise, or any portion thereof, of any other company existing in this State or any other State, and to subscribe for and own stock in any other railroad company or companies with whose road the

road of this said company, or any part thereof (including the road or roads which may be constructed under the provisions of this act), may be united or connected, on such terms and conditions as may be agreed on by and with the interested and contracting parties; the objects of these provisions being to promote and facilitate as far as practicable connections between the railroads and system of roads in this State and the railroads and system of roads in adjacent States, constructed and to be constructed. All the rights, powers, and privileges possessed and to be possessed by the said Alabama and Tennessee River Railroad Company under their act of incorporation and other acts may and shall be extended and applicable to all railroads and railroad companies which may become connected, or united, or consolidated with the road, in stock or franchise, in whole or in part, of said Alabama and Tennessee River Railroad Company, or any road to be constructed by them under the provisions of this act, so far as said rights, powers, and privileges may be pertinent or applicable, or can be rendered pertinent or applicable, to the companies or roads which may be united or consolidated with, in whole or in part, all contracts or agreements which may be made by said company with any other railroad company or companies in pursuance of the provisions of this act, and having in view the objects and purposes of these enactments as above declared (that in the promotion of connections between the railroads of this and other States) shall be valid according to the terms thereof so far as the same shall not be contrary to law.

* * * * * *

SEC. 6. *Be it further enacted*, That said company shall have power to change the name of their company, if they shall so desire at any time, for one less inconvenient in length; and in case of change the corporate name shall be such as the company shall select and by resolution of the stockholders in convention shall declare; and under the new name which may be selected and adopted shall continue and exist in all respects, with all rights, privileges, liabilities and obligations as under their present name.

SEC. 7. *Be it further enacted*, That no change in the name of said company, should the name be changed as authorized by this act, nor anything in this act contained, shall

have the effect to release said company from any legal or equitable obligation whatsoever of said company, but all such obligations shall be and remain in full force after as before the passage of this act.

Approved February 20, 1866.

By a subsequent act, approved February 8, 1867, and set forth in full in the findings of fact (pp. 6, 7), the Legislature of Alabama approved the consolidation of the Dalton and Jacksonville Railroad Company and the Georgia and Alabama Railroad Company with the Alabama and Tennessee Rivers Railroad Company so as to form one consolidated railroad company for the construction and use of a railroad to be constructed from Blue Mountain, Alabama, as a continuation of the Alabama and Tennessee Rivers Railroad to Dalton, Georgia, and authorized the consolidated company to adopt as its corporate name and style the name and style of "The Selma, Rome, and Dalton Railroad Company," and to adopt as its charter the charter of the Alabama and Tennessee Rivers Railroad Company. These companies, including the Alabama and Tennessee Rivers Railroad Company, accepted the terms of these acts and consolidated under the name of "The Selma, Rome, and Dalton Railroad Company," which is the claimant in this case (p. 7).

The Postmaster-General of the United States on May 27, 1861, issued a general order (p. 7) suspending all postal service in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas from and after May 31, 1861, and in addition a special order (p. 8) discontinuing the service on the particular route in question in this case from the day named. On the 10th of July, 1861, he issued a further order (p. 7) suspending the entire postal service in Middle and West Tennessee; and on the 21st of December, 1861, he issued another order (p. 8) discontinuing the postal service on a very large number of routes in Missouri. This

action was taken under the provisions of the act of February 28, 1861, 12 Stat. L. 177, 178, which provided:

"That whenever, in the opinion of the Postmaster-General, the postal service cannot be safely continued, or the post-office revenues collected, or the postal laws maintained, on any post route, by reason of any cause whatsoever, the Postmaster-General is hereby authorized to discontinue the postal service on such route, or any part thereof, and any post-offices thereon, till the same can be safely restored, and shall report his action to Congress."

On the 29th of April, 1861, the Postmaster-General of the so-called Confederate States made a report (p. 8) to the President of the Confederacy, in which he submitted to the latter a circular (p. 10) which he had issued to contractors performing service under contracts with the United States Government, in which he informed such contractors that the Government of the Confederate States would not interfere with any existing contracts entered into between the Government of the United States and the present contractors until it (the Confederate Government) should assume entire control of the postal affairs throughout the seceded States. He added:

"The question as to whether the Government of the Confederate States will assume any liability to present contractors before it assumes the control of our postal affairs involves the idea of liability on the part of this Government for the obligations of the United States, which cannot be entertained by this Department; but if the Government of the United States should abandon the mail service in the Confederate States before the Department shall be organized and ready to enter into new contracts, I am authorized to continue existing contracts provisionally, by proclamation, until new contracts can be entered into."

He also annexed to this report another circular (p. 11) which had been issued by him addressed to postmasters throughout the South in which postmasters were instructed as follows:

"SIR: All postmasters and other employés in the postal service are directed to continue the performance of their respective duties as such, and render all their accounts and pay all moneys to the order of the Government of the United States as they have heretofore done, until the Government of the Confederate States shall be prepared to assume the entire control of its postal affairs."

He added in the same circular that the Post-Office Department of the Confederate States would be organized as soon as practicable, but declared that it was then out of his power to determine definitely when the new service would be substituted for the old; also, that no removals or appointments of postmasters or others in the service would be made by that Department, nor would it receive returns relating to or moneys derived from the postal service, until it could assume entire control of the service. This circular closed as follows (p. 12):

"We must regard the carrying of our mails at this time by that Government as a great public necessity to the people of both Governments, resulting from their past intimate, political, commercial, and social relations, and alike important to the preservation of the present interest of the people of both countries; and while that Government, by its action, consults such considerations, our Government and people should act with the same high regard for great public interests. Such a course on our part, springing from such motives, will preserve the character of our people without impairing the dignity of our Government, and may lead to the transfer of our postal service from the control of the old to that of the new Government with far less injury to the people of both than would necessarily flow from precipitate and inconsiderate action on the part of either.

"You will please acknowledge receipt of this circular."

The reasons promoting the issuance of these two circulars were explained in the Postmaster-General's report to the Confederate President as follows (p. 9):

"It was hoped this course would have beneficial effects, by removing all doubts as to the duty for the time being of those engaged in the postal service, and by showing to the Government at Washington that, so long as it continued to hold itself liable for the mail service in the Confederate States, it should receive all the revenues derived from that service. It was supposed, too, that it was greatly to the interest of that country, as well as to the interest of those of our own, to avoid a sudden suspension of the postal communication between the people of the two countries, and to avoid being brought at once to practical non-intercourse, which it was supposed would occur if this Department had been required to assume the control of the service before its organization, and before any time had been given to provide the means of passing the mails across the frontier. And when that policy was determined on it was not known that actual hostilities would occur; but it was then supposed to be possible that our separation from the United States might be peaceably effected, and that all questions relating to the public property and to pecuniary liability between the two countries might be settled by negotiation on terms of equality."

Subsequently, on the 13th of May, 1861, the Confederate Postmaster-General issued the following proclamation (pp. 12–14):

"Whereas, by the provisions of an act approved March 15, 1861, and amended by the first section of an act approved May 9, 1861, the Postmaster-General 'is authorized, on and after a day to be named by him for that purpose, to take the entire charge and direction of the postal service in the Confederate States,' and all conveyance of mails within their limits from and after such day, except by authority of the Postmaster-General is hereby prohibited:

"Now, therefore, I, John H. Reagan, Postmaster-General of the Confederate States of America, do issue this, my proclamation, notifying all postmasters, contractors, and special and route agents in the service of the Post-office Department, and engaged in the transmission and delivery of the mails, or otherwise in any manner connected with the service within the limits of the Confederate States of America, that on and after the first day of June next I

shall assume the entire control and direction of the postal service therein. And I hereby direct all postmasters, route agents, and special agents within these States, and now acting under the authority and direction of the Postmaster-General of the United States, to continue in the discharge of their respective duties, under the authority vested in me by the congress of the Confederate States, in strict conformity with such existing laws and regulations as are not inconsistent with the laws and constitution of the Confederate States of America, and such further instructions as may hereafter be issued by my direction. And the said postmasters, route agents, and special agents are also required to forward to this department, without delay, their names, with the names of the offices of which they are postmasters (giving the State and county), to be directed to the 'chief of appointment bureau, post-office department, Montgomery, Alabama,' in order that new commissions may be issued under the authority of this Government; and the postmasters are hereby required to render to the Post-office Department at Washington, D. C., their final accounts and their vouchers for postal receipts and expenditures up to the 31st day of this month, taking care to forward with said accounts all postage-stamps and stamped envelopes remaining on hand belonging to the Post-office Department of the United States, in order that they may receive the proper credits therefor in the adjustment of their accounts; and they are further required to retain in their possession, to meet the orders of the Postmaster-General of the United States for the payment of mail service within the Confederate States, all revenue which shall have accrued from the postal service prior to the said 1st day of June next.

"All contractors, mail messengers, and special contractors, for conveying the mails within the Confederate States, under existing contracts with the Government of the United States, are hereby authorized to continue to perform such service under my direction from and after the day last abovenamed, subject to such modifications and changes as may be found necessary, under the powers vested in the Postmaster-General by the terms of said contracts and the provisions of the second section of an act approved May 9th, 1861, conformable thereto. And the said contractors, special contractors, and mail messengers are required to

forward without delay the number of their route or routes, the nature of the service thereon, the schedule of arrivals and departures, the names of the offices supplied, and the amount of annual compensation for present service, together with their address, directed to the 'chief of the contract bureau, post-office department, Montgomery, Alabama.'

"Until a postal treaty shall be made with the Government of the United States for the exchange of mails between that Government and the Government of this Confederacy, postmasters will not be authorized to collect United States postage on mail matter sent to or received from those States; and until supplies of postage stamps and stamped envelopes are procured for the prepayment of postage within the Confederate States, all postages must be paid in money, under the provisions of the first section of an act approved March 1st, 1861.

"Given under my hand and the seal of the post-office department of the Confederate States of America, at Montgomery, Alabama, the 13th day of May, in the year 1861.

[SEAL.] "JOHN H. REAGAN,
"*Postmaster-General.*"

This proclamation, it will be observed, fixed the date when the Confederate Government should take the entire control of the postal service as June 1, 1861, and the Court of Claims finds as a fact (p. 8) that the Confederate Government did take charge of the postal service on the Alabama and Tennessee Rivers Railroad in accordance with the proclamation upon that date, and (p. 16) that immediately thereupon that railroad company commenced to carry the mails for the Confederate States Government.

On the 30th of August, 1861, the Confederate Congress passed an act (pp. 14, 15) requiring the Postmaster-General to collect all moneys due from the several postmasters within the Confederate States, and which they had not paid over at the time the Confederate States took charge of the postal service, and directing that the moneys so received should constitute a fund for the payment of claims for

postal service which accrued before the Postmaster-General took charge of the postal service in the States comprising the Confederacy. This act further provided that the Postmaster-General should give public notice by a proclamation calling on all citizens of the Confederate States who had rendered postal service in any of the States of the Confederacy under contracts or appointments made by the United States Government before the Confederate States Government took charge of the service to present their claims to the Confederate Post-Office Department, verified and established according to such rules as should be prescribed by the Postmaster-General, and requiring the claimants to state under oath the particulars of their claims, and provided that the Postmaster-General should, as soon as he should have collected such moneys from the postmasters and ascertained the amount of the claims, make a report, so that future action might be taken as respects the distribution. The second section of the act (p. 15) provided that all claims under it should be barred unless presented within six months after the date of the proclamation of the Postmaster-General.

By a subsequent act of the Confederate Congress approved September 27, 1862 (p. 15), the Postmaster-General was directed to proceed to pay to the several claimants the sums respectively found due and owing to them for postal service rendered in any of the States of the Confederacy under contracts or appointments made by the United States Government before the Confederate States Government took charge of said service, as the said sums should have been credited and ascertained by him under the provisions of the previous act, with the proviso that the benefits of the act should only extend to "loyal citizens of the Confederate States."

Whether the Alabama and Tennessee Rivers Railroad Company ever took any steps to avail itself of the benefits

of these acts of the Confederate Congress, or if it did, whether it ever received any of the benefits of those acts, is not disclosed by any of the findings of the Court of Claims.

At an early day after the passage of the act of March 3, 1877, upon which this suit is founded, the Secretary of the Treasury issued an order (p. 16) that no payments should be made out of the appropriation therein made until all claims covered by its terms should have been received and adjusted, and that if the appropriation should prove insufficient, they should then be paid *pro rata*. In consequence of this order no claims were adjusted within two years after the passage of the act, and the appropriation was therefore covered into the Treasury under the requirement of section 5 of the legislative, executive, and judicial appropriation act of June 20, 1874, 18 Stat. L. 85, which provides "that from and after the first day of July, 1874, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury."

The Court of Claims, without rendering any opinion, decided adversely to the claim, referring for its reasons to the case of *Blount* v. *United States*, 21 C. Cls. 274, wherein it was held by that Court that the above-cited clause of the sundry civil appropriation act of 1877 operated as a new promise of the Government to the claimants, upon which suit might be brought in that Court; but that the proviso to the act, "that any such claims which have been paid by the Confederate States Government shall not be again paid," taken in connection with the legislation of the Confederate Government on that subject, raised the presumption that every claimant whose case came within the terms of the Confederate statutes had been paid in full by that Government, and that it was incumbent upon the claimant

in each case to remove that presumption by satisfactory evidence.

From the judgment of dismissal the claimant appealed to this Court.

II.

Assignment of Errors.

The appellant hereby assigns the following errors in the rulings and judgment of the Court of Claims:

1. Error in holding that the proviso in the sundry civil appropriation act of March 3, 1877, taken in connection with the Confederate statutes of August 30, 1861, and September 27, 1862, raised the presumption that claims for postal service covered by the terms of said Confederate statutes had been paid, whereas said Court should have held that no presumption of payment arose out of said Confederate statutes in the absence of any evidence connecting this claimant with the enactment or enforcement of said statutes, or showing that this claimant presented or collected a claim thereunder.

2. Error in holding that the burden of proof under said act of March 3, 1877, was upon the claimant to show that its claim had not been paid by the Confederate Government, whereas said Court should have held that the burden of proof upon that issue was upon the United States to prove that said claim had been paid.

3. Error in rendering final judgment against the claimant upon the findings of fact made by said Court, whereas, upon the findings made, the judgment should have been in favor of the claimant for the recovery of payment under its contract at the rate of $12,000 a year from January 1, 1861, to May 31, 1861, with one month's extra pay for discontinuance of service, less $95.19 already paid.

III.

Brief.

1. Rights of the Present Claimant as Successor of the Alabama and Tennessee Rivers Railroad Company.

The first question arising in this case relates to the right of the present claimant to recover on the claim sued for in the capacity of successor of the Alabama and Tennessee Rivers Railroad Company, with which the original mail contract was made, in 1858, and which rendered the mail service for which payment is now claimed. In *St. Paul & Duluth R. R. Co.* v. *United States*, 112 U. S. 733, this court decided that where a railroad company entered into contract with the United States, and under it performed mail service, and subsequently, and during the pendency of the contract, the property of the railroad company was sold upon a decree rendered in a suit to foreclose a mortgage, the purchaser of the property of the company at the mortgage sale did not thereby become vested either with the right to recover in the Court of Claims as assignee of the claim for mail service previously rendered or as assignee of the contract with the United States to recover for mail service rendered by the new company after its purchase of the railroad property. The present case differs vitally from that of the St. Paul and Duluth Railroad Company. The present claimant is not the purchaser of the assets of the Alabama and Tennessee Rivers Railroad Company at a judicial or other sale, but is a company formed by the consolidation of the Alabama and Tennessee Rivers Railroad Company and two other companies under and by virtue of acts of the Legislature of Alabama approved February 20, 1866, and February 8, 1867. The consolidated company was by these acts authorized to adopt as its name

and style the name and style of the Selma, Rome, and Dalton Railroad Company, and to adopt as its charter the charter of the Alabama and Tennessee Rivers Railroad Company as now existing, with its amendments, and under and by said name and style and charter was authorized to possess, enjoy, and exercise all its lawful rights, functions, powers, and privileges. These acts operated as a consolidation of these companies into a new one vested with all the rights of the old companies and the successor of those companies. The point is thus stated in an American note in Green's Brice's Ultra Vires, p. 637:

"The effect of consolidation, generally speaking, is to put an end to the old corporations and create a new one. A new entity is created, to which pass the combined rights and obligations of the old ones. The general rule, as to the effect of consolidation, is laid down in *Paine* v. *Lake Erie & Louisville R. R. Co.*, 31 Ind. 283, 349, where it is said: 'It is clear to our minds that the new company succeeded to the rights of the old corporations. The new was composed of the elements of the old; it was the same under a new form. It is only a play upon words to say that, phœnix-like, the new arose from the ashes of the old. There was no turning to ashes required. It only required a commingling of the elements of which the old was composed. The new assumed the liabilities and succeeded to the rights of the old.' The Court, therefore, decide that the new company may compromise and settle a claim against one of the original companies and sustain an action to enforce a settlement. Similarly, in *Miller* v. *Lancaster*, 5 Coldw. (Tenn.) 514, 520, after citation of many authorities, it is said: 'The foregoing authorities suffice, if any were needed, to establish the position that where such consolidation and merger of corporations are made, and such transfer of rights and properties and assumption of liabilities between the old and new companies are effected, the new company stands in the stead of the old companies, and may enforce the rights of the old companies and be subjected to their liabilities. See, also, *Columbus R. R. Co.* v. *Powell*, 40 Ind. 37; *Chicago, &c., R. R. Co.* v. *Moffit*, 75 Ill. 524; *Thompson* v. *Abbott*, 61 Mo. 176; *Zimmer* v. *State*, 30 Ark.

677. It would seem, therefore, that all choses in action belonging to the old companies could be enforced by the new, in the same way and to the same degree. And, indeed, it might be said that all the rights were transferred and could be exercised as before."

The decisions of this Court are in full accordance with these views.

In the case of *Philadelphia, Wilmington, and Baltimore R. R. Co.* v. *Maryland*, 10 How. 363, this Court held that a railroad company formed by the consolidation of two other companies stood in their place and possessed the powers, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them, and that where one of the two roads had been by statute exempted from taxation and the other had not, the exemption continued in force for the benefit of the consolidated road with respect to the portion acquired from the exempted railroad company, but not as to that acquired from the company not exempted.

In *Clearwater* v. *Meredith*, 1 Wall. 25, the point is thus stated (p. 40):

"The effect of consolidation was a dissolution of the three corporations, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of existence."

In *Tomlinson* v. *Branch*, 15 Wall. 460, the previous decision in *Philadelphia, Wilmington, and Baltimore R. R. Co.* v. *Maryland* was sustained, and the effect of the consolidation was stated as follows:

"All its rights and duties, its privileges and obligations as related to the public, or to third persons, remain, and devolve upon the new company."

In *Nugent* v. *The Supervisors*, 19 Wall. 241, this Court decided that a subscriber for stock in a railroad company was not released from his subscription by a subsequent

consolidation of the road with another, provided the general purposes of the new company remained the same as those of the old; and the Court again stated the effect of consolidation,—this time as follows (p. 248):

"This consolidation was authorized by the general laws of the two States, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was, that the consolidated company succeeded to all the rights, property, and privileges which belonged to each of the two companies out of which it was formed before their consolidation."

The same was held in *County of Scotland* v. *Thomas*, 94 U. S. 662. In *Chesapeake and Ohio R. R. Co.* v. *Virginia*, 94 U. S. 718, the question was as to the exemption of the property of the railroad company from taxation, it having been formed by the consolidation of the Virginia Central Railroad Company with certain other companies, and the question was as to what part, if any, of its property was exempted from taxation under certain statutes. This Court held, in reaffirmance of its previous decisions, that such part of the property of the road as was exempted from taxation previous to the consolidation remained so after the consolidation, but that no other property was exempted.

Special attention is called to this case of the Chesapeake and Ohio Railroad Company, because the Court of Claims has in a recent case recognized the right of that company to recover for services performed by one of the companies out of which it was consolidated—the Virginia Central—of a precisely similar character to the services for which payment is claimed in the present case. *Chesapeake & Ohio R. R. Co.* v. *United States*, 20 C. Cls. 49.

The point was evidently brought to the attention of that Court, for in a previous action brought on the same claim by the Chesapeake and Ohio Rail*way* Company, the pur-

chaser at the mortgage sale of the assets of the Chesapeake and Ohio Railroad Company, that Court had held, in accordance with the law decided by this Court in *St. Paul and Duluth R. R. Co.* v. *United States*, that that company as purchaser was not entitled to recover.

In *Green County* v. *Conness*, 109 U. S. 104, the same point was raised as to the effect of the consolidation which appears to be raised on behalf of the Government in the present case. But this Court said (p. 106):

"If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but 'consolidation' is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. This point was considered in the case of *Tomlinson* v. *Branch*, 15 Wall. 460, and *Branch* v. *City of Charleston*, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, 'upon such terms as may be deemed just and proper,' would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect; and the Court has found that this was done. We think, therefore, that the point is not well taken."

And still more recently, in *Tennessee* v. *Whitworth*, 117 U. S. 139, this Court has restated the rule as to consolidation as follows (p. 147):

"When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created."

From these authorities it follows that the Selma, Rome,

and Dalton Railroad Company is in law the successor of the Alabama and Tennessee Rivers Railroad Company.

We may indeed properly say that the new company is not merely the successor of the old, but is in law identical therewith. This was the view taken by this Court in *Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Howard*, 13 How. 307, where this Court stated (p. 333):

"It is further objected that the admission was not made by the defendants in this action, but by the Wilmington and Susquehannah corporation. It is true the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington, and Baltimore Railroad Company, it is very clear that, at the time the trial took place in Cecil County Court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannah Company, were done and made by the same corporation which now defends this action."

2. The Effect of the Act of March 3, 1877 (19 Stat. L. 344, 362), as a Promise to Pay the Contractors.

The next question in the case is, Did the act of March 3, 1877, by appropriating a sum of money for the payment of claims of mail contractors for mail service performed at a specified time and place, so recognize the validity of all claims included within its provisions as to operate as a new promise in favor of each claimant, and thereby give him a right of action in the Court of Claims after he had failed upon application to the Treasury Department to obtain the benefits of the act? On this point the reasoning of the Court of Claims in the case of *Blount* v. *United States*, 21 C. Cls. 274, and in the cases therein referred to and

quoted, is so cogent and complete that we cite in full that part of the opinion which relates to this point, and beg leave to adopt it as a part of this argument, as follows (pp. 274–279):

"In the *sundry civil appropriation act* of March 3, 1877 (19 Stat. L. 362), is the following provision:

"'That the sum of $375,000, or so much thereof as may be necessary, be appropriated to pay the amount due to mail contractors for mail service performed in the State of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, Tennessee, Virginia, and West Virginia, in the years 1859, 1860, 1861, and before said States respectively engaged in war against the United States; and the provisions of 3480 of Revised Statutes of the United States shall not be applicable to the payments therein authorized: *Provided*, That any such claims which have been paid by the Confederate States Government shall not be again paid.'

"At an early day after the passage of this act the Secretary of the Treasury issued an order that no payments should be made out of that appropriation until *all* claims covered by its terms should have been received and adjusted; and if the appropriation should prove insufficient, they should then be paid *pro rata*. In consequence of this order no claims were adjusted within two years after the date of the act, and the appropriation was, therefore, covered into the Treasury, under the requirement of section 5 of the *legislative, executive, and judicial appropriation act* of June 20, 1874 (18 Stat. L. ch. 328, p. 85), which provides 'that from and after the first day of July, 1874, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury.'

"Prior to the passage of this act the claim was barred from prosecution in this Court by section 1069 of the Revised Statutes.

"The defendants contend that the Court derives no jurisdiction by virtue of this appropriation.

"The Court has had occasion to consider and rule upon that question several times, but as counsel, with commend-

able zeal in behalf of the Government, have again pressed it upon the attention of the Court, we have gone over our former rulings and considered the question anew.

"In *Hukill's Case* (16 C. Cls. 562) Chief Justice Drake, delivering the opinion of the Court, said:

"'This covering of the appropriation into the Treasury deprived the officers of the Treasury Department of any power to pay this claim, and consequently the claimant is wholly without recourse if he has it not in this Court.

"'On behalf of the defendants it is contended that he has no right to payment, except out of that particular appropriation; which being no longer available, he has no legal standing as a creditor of the Government, here or elsewhere. We do not concur in that view.

"'An appropriation by Congress of a given sum of money, for a named purpose, is not a designation of any particular pile of coin or roll of notes to be set aside and held for that purpose, and to be used for no other; but simply a legal authority to apply so much of any money in the Treasury to the indicated object.

"'Every appropriation for the payment of a particular demand, or a class of demands, necessarily involves and includes the recognition by Congress of the legality and justice of each demand, and is equivalent to an express mandate to the Treasury officers to pay it. This recognition is not affected by any previous adverse action of Congress; for the last expression by that body supersedes all such previous action.

"'When, therefore, Congress made the appropriation in question, it was as if the United States said to this claimant, and every other of like kind: "The legality and justice of paying you for the service you rendered in carrying the mails under your contract with the United States in 1859, 1860, or 1861 are recognized; and if you were not paid by the Confederate States Government for so much of that service as you rendered before the State in which it was rendered 'engaged in war against the United States,' you can, on application to the proper officers at the Treasury, get whatever amount may be legally ascertained to be due you for that service; and in order to remove the obstacle to your payment which section 3480 of the Revised Statutes has heretofore interposed, we declare that that section shall not apply to your case."

"'So, in effect, by that appropriation, said Congress to those contractors, well knowing when it did so that, unless it so said, there was no possible way for them to get payment through executive action, and that their right to invoke the aid of this Court had long before been barred by existing law.

"'Did Congress intend that that recognition of the legality and justice of those claims should be annulled unless the parties succeeded in getting payment before the end of the two years? We think not. Beyond doubt, the authority to take the money out of the Treasury for such payment under *that* appropriation lapsed at the end of the two years; but the right of the parties to assert and maintain their claims, once recognized and affirmed by Congress, became thenceforth, in virtue of that act, an acknowledged right against the United States, which this Court is bound to take cognizance of under its general power "to hear and determine all claims founded upon any law of Congress."'

"In *Huffman's Case* (17 C. Cls. 55) the Court (Judge Nott giving the opinion) said:

"'It was said on the argument that the decision in the *Ludington Case* (15 C. Cls. 453) decides this; and reference was made to the second section of the *act 16th June*, 1874 (1 Sup. Rev. Stat. p. 37), and to the fourth section of the *act 14th June*, 1878 (Ibid., p. 350), as being substantially the same in effect, the former governing the Ludington case and the latter this. But the distinction between the two cases lies behind the operation of these statutory provisions, and is, we think, a broad one.

"'In Ludington's case the executive officers were without authority to pay the class of claims to which it belonged, and their duty was limited to reporting the facts connected with them to Congress, there to await legislative action. The claimant founded his suit on such a report, upon the theory that it was an award. The Court held that the provision of the *act 16th June*, 1878 (1 Sup. Rev. Stat. p. 37, sec. 2), requiring the consideration of Congress upon the reports of the officers charged with the examination of such claims, took away whatever character of an award such reports previously might have had. In this case Congress validated a class of claims, appropriated money to satisfy them, and directed the Secretary of the Treasury to examine and pay them. The Secretary did not examine

them, and this suit is not founded upon any report of his. The fact that he did not pay the claims while the appropriation remained under his control did not extinguish the parties' rights; and the general statutory provision in the act 1878 (1 Sup. Rev. Stat. p. 350), directing the accounting officers to continue to examine claims "under appropriations, the balance of which may have been exhausted or carried to the surplus fund," and directing the Secretary to report the amount due to each claimant to the Speaker of the House, to be laid before Congress "for consideration," does not affect the causes of action, nor change their character, nor remove them from the jurisdiction of this Court. In a word, the decision of the Court in Ludington's case was that the alleged cause of action had never become complete; and the ruling of the Court in this case is that a perfected right of action is not taken away by the lapsing of an appropriation under provisions of law which are intended to regulate the power and duties of the accounting officers.'

"In *Mordecai's Case* (19 C. Cls. 11) the Court, by Judge Richardson (now chief justice) said:

"'We have held in several cases that mail contractors described in that act may recover for "mail service performed" in the States therein named during the years 1859, 1860, and 1861, notwithstanding the period of six years' limitation had expired before the passage of the act, on the ground that Congress had revived and renewed the cause of action, as of the date of the passage of the act, by thus appropriating and providing the means of payment.'

"In many other cases involving the same question the Court has assumed jurisdiction: (*Hukill et al.*, 18 C. Cls. 181; *George's Case*, 18 C. Cls. 432; *Wray's Case*, 19 C. Cls. 154; *Chesapeake and Ohio Railway Co.* 19 C. Cls. 300; *Chesapeake and Ohio R. R. Co.* 20 C. Cls. 49; *Nashville, Chattanooga, and St. Louis Railway*, 19 C. Cls. 476.)

"The latter case was appealed to the Supreme Court and the judgment of this Court affirmed, without questioning the jurisdiction (113 U. S. 261). It does not appear, from the report of the case, that the question of jurisdiction was discussed by counsel.

"The particular question presented to and decided by the Court was whether the claims had been included and settled in a certain decree rendered in a former suit in

equity between the parties, and which decree had been set up by the Government as a defense to the claim. The Court held that it was so included, and that the decree was therefore a bar to a suit by the railroad company for this mail service.

"The Court had all the facts before it, showing that the claim was entirely based upon the appropriation act of 1877, and could not have decided that it was included in the decree without taking notice of what the claim consisted, and, thus taking notice, consenting to the jurisdiction assumed by this Court.

"*Jordan's Case* (19 C. Cls. 108) is very similar in its facts to the pending case, and involves the same question of jurisdiction. In that case the act authorized and directed the Secretary of the Treasury to refund to the persons named certain taxes. Outside of this act these persons had no legal claim upon the Government. Part only of the taxes was refunded by the Secretary, and the beneficiaries of the act brought suit in this Court to recover the balance. The Court took jurisdiction and gave judgment for the claimants. The case was appealed to the Supreme Court, and there affirmed (113 U. S. 418).

"All differences in the facts of the two cases are in favor of the present suit. In that case the Secretary was directed and required to pay; in this there is a simple appropriation, without specific directions as to the mode of payment. In that case the claimants had never been clothed with legal rights against the Government; in this a legal right, based upon contracts, once existed, but had been lost by lapse of time.

"That the parties were named in the appropriation act in the one case and not in the other can make no difference, because in the latter case the class of beneficiaries is definitely described.

"'All claims founded upon any law of Congress' constitute one branch of our jurisdiction. That an appropriation by a law of Congress of a definite sum of money for the relief of a specified class of claimants is, with some few exceptions, embraced within these words, we have no doubt."

After this very complete statement of the grounds upon which the Court of Claims supports its jurisdiction in this

class of cases, it seems almost a work of supererogation to add arguments to those presented by the Court of Claims. Yet we submit that the case is a much stronger one in favor of the jurisdiction of the Court of Claims under the peculiar circumstances found by the Court as to the refusal of the Secretary of the Treasury to take up and adjudicate any claims under the act than if the Secretary had given this claimant a fair hearing on the merits of its case and rendered a decision against it. The case of *Campbell* v. *United States*, 107 U. S. 407, is here in point.

That was a suit for drawback under certain acts of Congress which allowed such drawback and required it to be ascertained under regulations prescribed by the Secretary of the Treasury. The Secretary prescribed regulations for the ascertainment of the drawback, but subsequently prohibited the Collector of Customs from proceeding under these regulations or in any other mode. This rendered it impossible for the claimant to get his drawback, and he thereupon brought suit in the Court of Claims for its recovery. The Court of Claims dismissed the petition on the ground that as the law required the amount of drawback to be ascertained by the Secretary of the Treasury, no right of action accrued until it was ascertained. This Court, however, reversed this judgment, and in doing so made the following remarks (pp. 411, 412):

"The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations cannot defeat a right which the act of Congress gives.

"The second section of the act of September 20, 1850, c. 84, entitled 'An act to enable the State of Arkansas and other States to reclaim the "swamp lands" within their limits,' declares: 'That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list

and plats of the land described as aforesaid, and transmit the same to the governor of the State, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee-simple to said lands shall vest in the said State.'

"This duty was almost wholly neglected by the Secretary.

"In the case of *Railroad Company* v. *Smith*, 9 Wall. 95, 99, it was insisted that the failure of the Secretary to act made these lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act. This proposition was thus answered by this Court: 'Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. * * * Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the State, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant;' that is, were granted to the State as swamp lands.

"And in *French* v. *Fyan*, 93 U. S. 169, 173, the Court, reaffirming *Railroad Company* v. *Smith*, said: 'There was no means, as this Court has decided, to compel him (the Secretary) to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty.'

"The application of this reasoning to the present case is too clear to need illustration."

So, in the present case, the right of the claimant to recover such amounts as might be due it for mail service was dependent upon the law itself, and not upon any regu-

lation of the Secretary of the Treasury; and the fact that the Secretary refused to obey the law cannot defeat the claimant's rights. It is hardly necessary to argue the propriety or impropriety of the Secretary's action in the matter. His refusal to take up or adjudicate the cases until all the claims had been presented is such a manifest pretext to avoid taking them up at all that it is almost unnecessary to say anything on that subject. There is not a word in the act which provides for any *pro-rata* payment of the claims; on the contrary, the appropriation of "$375,000, or so much thereof as may be necessary," clearly shows that Congress was of the opinion that it was appropriating a sum sufficient to cover, or more than cover, all claims likely to be presented and proved up. If, however, that amount had proved insufficient, it was then the plain duty of the accounting officers of the Treasury, under the terms of the acts of Congress of June 20, 1874 (18 Stat. L. 110, 111), and June 14, 1878 (20 Stat. L. 130), to continue to receive, examine, and consider claims under the appropriation even though it was exhausted, and to report them at each session of Congress to the Speaker of the House of Representatives for the consideration of Congress. The idea that Congress intended to scale the proved and acknowledged debts of the Government, is too dishonorable a policy to be imputed to the National Legislature; and there is nothing in the act to give countenance to any such interpretation of the action of Congress.

3. To what Date is the Claimant Entitled to Recover?

The next question is as to the meaning of the clause in the act, "in the years 1859, 1860, 1861, and before said States respectively engaged in war against the United States." The service in the present case was performed on the line of the claimant railroad company, extending

from Selma to Talladega, and was throughout its course within the limits of the State of Alabama. The question, therefore, is, at what time within the meaning of this act did the State of Alabama engage in war against the United States?

It appears by the findings that under the terms of the act of February 28, 1861 (12 Stat. L. 177, 178), which authorized the Postmaster-General to discontinue the mail service in any States or parts of States where in his opinion the same could not be safely maintained, the Postmaster-General on the 27th of May, 1861, issued a general order suspending all postal service in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas from and after the 31st of that month, and on the same day issued a special order applying the terms of this general order to this particular route. Also, that on the 10th of July, 1861, he issued another order discontinuing the entire postal service in Middle and West Tennessee from and after that date, and that on the 21st of December, 1861, he issued a third order discontinuing the mail service on a very large number of routes in the State of Missouri. The grounds and objects of this policy received full consideration at the hands of this Court in the case of *Reeside* v. *United States*, 8 Wall. 38.

That was a suit by a mail contractor to recover one month's extra pay under the terms of his contract on account of the discontinuance of mail service by the Postmaster-General under the terms of the general order of May 27, 1861, just referred to, and the Court thus explained the policy of the Government in continuing the mail service throughout the rebellious States to the late date that it did:

"The truth is (and this affords an explanation of the otherwise extraordinary dealings with this contractor) that, although a state of war existed between the United States

and several of the Southern States, or portions of them, the territorial limits within which it existed was not well defined. Even as late as July 13th, 1861, an act of Congress was passed authorizing the President, under the particular circumstances stated therein, to issue a proclamation declaring any one of these States, or any part of it, to be in a state of insurrection against the United States, and thereupon all intercourse should cease between the same and the citizens thereof and the citizens of the rest of the United States. (12 Stat. at Large, 257.) This proclamation was not issued till the 16th of August following, when certain States, including Arkansas, Mississippi, and Louisiana, were first declared to be in a state of insurrection within the act, and all intercourse with the loyal States was prohibited. (Ib. 1262, Appendix.)

"This intercourse was but partially interrupted at the time these contracts were suspended; and although a disloyal feeling prevailed, and was apparently increasing, yet the policy of the Government was to conciliate the people, and separate them, if possible, from the leaders; and one of the means used for this purpose was to continue these mail and postal accommodations so long as any hope existed of preventing the rebellion or continuing peaceful relations. The suspension of these contracts, instead of putting an end to them at once, and the demand upon the contractor to keep his stage property on hand ready to render service, doubtless grew out of this policy."

Now we insist that under the terms of the act of March 3, 1877, it was the manifest intention of Congress to allow payment for all mail service performed throughout the Southern States upon the faith of contracts with the Government up to the time when the war became so flagrant that mail service was entirely discontinued between the loyal and the rebellious States.

It is true that this Court decided in the case of *The Protector*, 12 Wall. 700, which was a case coming up from the Circuit Court of the United States for the Southern District of Alabama, that the rebellion commenced in Alabama on the 19th of April, 1861, and closed in that

State on the 2d of April, 1866. This, however, was with reference to the rule that the statute of limitations did not run during the rebellion against citizens of States adhering to the National Government having demands against citizens of the insurgent States. The date fixed in this decision as that of the commencement of the rebellion in Alabama was that of the proclamation of intended blockade by the President, which was held by this Court to be a public act of the political department of the Government fixing the date of the commencement of the war.

However, in *United States* v. *Anderson*, 9 Wall. 56, where the question arose as to the meaning of the Captured and Abandoned Property Act, which authorizes suits to be brought in the Court of Claims in certain cases at any time within two years after the suppression of the rebellion, this Court decided that, so far as the purposes of that act were concerned, the rebellion could not be considered as suppressed until August 20, 1866.

In rendering this decision, however, the Court was evidently of opinion that there might be different dates of suppression of the rebellion, and that it might be considered as suppressed at one time for the purposes of one particular case and at some other time for some other purpose. This is clear from the language of the Court, page 69, where the Court inquires, "When is the rebellion to be considered suppressed *as regards the rights intended to be secured by this statute?*"

And again:

"And in this connection it is proper to say that the purposes of this suit do not require us to discuss the question—which may have an important bearing on other cases—whether the rebellion can be considered as suppressed for one purpose and not for another, nor any of the kindred questions arising out of it, and we therefore express no opinion on the subject."

Clearly this shows that the commencement and suppres-

sion of the rebellion have no certain and clearly-defined dates, and must be regarded as having begun and ended on one date or another, according as the nature of the subject-matter might require a decision. According to these decisions in *United States* v. *Anderson* and *The Protector*, the rebellion would be considered in the very same state as suppressed on the 2d of April, 1866, for one purpose and on the 20th of August, 1866, for another.

The Prize Cases, 2 Black, 635, contain instructive definitions of what this Court regards as the commencement of the Civil War. This Court on page 666 of that case says:

"When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a *war*."

And again, page 673:

"It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power."

The case of *Matthews* v. *McStea*, 91 U. S. 7, is a strong illustration of the extent to which the circumstances of the particular case in question are taken into consideration by this Court in deciding the date at which the war of the rebellion became flagrant. The question in that case was whether a partnership, where one of the members of the firm resided in New York and the other in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861. It was decided that, notwithstanding the President's proclamation of April 19, 1861, blockading the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, commercial intercourse not yet having been suspended, and not having been prohibited

until August 16, 1861, when the President, by authority of Congress, issued a proclamation stopping all commercial intercourse, the partnership was not dissolved until that date.

Guided by these expressed views of this Court, we ask upon what date did the several States of the so-called Confederacy engage in war with the United States in the sense in which those terms are used in the act of March 3, 1877?

It appears from this record that although authority had been granted by the act of February 28, 1861 (12 Stat. L. 177, 178), to the Postmaster-General to discontinue postal service on any route on which in his opinion the postal service could not be safely continued, or the postal revenues collected, or the postal laws maintained, yet the authority granted by this law was not exercised in the case of Alabama till the 27th of May following, when an order was issued suspending the postal service in that State, as well as a special order in the case of the Alabama and Tennessee Rivers Railroad Company discontinuing the service on that route. The policy of the Government in this matter was fully explained by this Court in the case of *Reeside* v. *United States*, above cited.

We find a corresponding policy prevailing on the part of the Confederate Post-Office Department. That Department issued in the Spring of 1861 a circular directing the postmasters and other postal employés to continue the performance of their respective duties as such and render all accounts and pay all moneys to the order of the Government *of the United States* as they had heretofore done until the Government of the Confederate States should be prepared to assume the entire control of its postal service.

The attention of the employés was specially directed to the regulations of the United States Post-Office Department in regard to the rendition of their accounts.

On the 13th of May, 1861, the Postmaster-General did,

however, issue his proclamation fixing the 1st of June as the date upon which the Confederate States Government would assume the entire control and direction of the postal service. Even at that late date, however, they were required by this proclamation (p. 13) "to render to the Post-Office Department *at Washington, D. C.*, their final accounts and their vouchers for postal receipts and expenditures up to the 31st day of this month, taking care to forward with said accounts all postage stamps and stamped envelopes remaining on hand belonging to the Post-Office Department of the United States, in order that they may receive the proper credit therefor in the adjustment of their accounts; and they are further required to retain in their possession, to meet the orders of the Postmaster-General *of the United States* for the payment of mail service within the Confederate States, all revenue which shall have accrued from the postal service prior to the said 1st day of June next."

We have here, therefore, a break clearly defined between the postal service of the Union and that of the Confederacy. The postal service of the United States ceased in Alabama on the 31st of May, 1861, that of the Confederate Government began on the 1st of June, 1861.

The date of the beginning of the war must be considered with reference to the subject-matter on which Congress was legislating when it used the expression "before said States respectively engaged in war against the United States." The law had reference to the postal service, and the expression must be construed with reference to the postal service. The question is: At what time did the State of Alabama engage in war against the United States as regards the postal service within her borders? In other words, at what time did rebellion become so flagrant that the Post-Office Department of the United States could no longer control the postal service within the borders of

Alabama, and at what time did the insurrectionary government usurp the control of that service thus abandoned by the United States? Clearly this date, as shown by the official acts and by the proclamations of both Governments, was the close of May and the beginning of June, 1861.

Congress by the act in question intended to pay all claimants the balances due them from the United States for all service performed by them before the Confederate Government took charge of the mails; and without undertaking in the hurry incident to the close of a short session of Congress to give the date, left it to be shown by evidence. It ought not to be presumed that Congress meant by the act in question to pay a certain sum on account to each contractor, leaving a balance to be settled by future legislation, or even worse, to be wiped out by repudiation. On the contrary, its evident intent was one of justice and liberality, to open the doors for every honest claimant who had not already received payment from the Confederate Government to recover from the United States the full amount due to him for services before the war.

In the case of *Cross* v. *United States*, 14 Wall. 479, this Court says, page 484:

"We cannot suppose, without an express declaration to that effect, that Congress intended to legislate in a manner that would enable a creditor of the Government to obtain only a *part* of his claim when the *whole* of it was deemed by the Court that tried the case to be meritorious."

The construction which we ask the Court to put upon the act agrees also with the rule laid down by Blackstone for the construction of statutes (1 Blackstone's Commentaries, 60), as follows:

"As to the *subject-matter*, words are always to be understood as having regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III forbids all ecclesiastical persons to purchase *provisions* at

Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only."

In the present case the breaking out of the war was referred to in connection with the postal service, and it is with reference to that service that the words used are to be interpreted.

The construction for which we contend is also imperatively demanded by the course of *legislation* of the Confederate Congress and that of the Union.

By circular of the Confederate Post-Office Department annexed to the report of the Confederate Postmaster-General, April 29, 1861, he declared (p. 10): "The question as to whether the Government of the Confederate States will assume any liability to present contractors before it assumes the control of our postal affairs, involves the idea of liability on the part of this Government for the obligations of the United States, which cannot be entertained by this Department." And in the same report he states that this circular was intended to inform contractors that the Confederate Government "would not assume any liability for the contracts of the United States." Subsequently, however, as appears by the Confederate legislation set forth on pages 14 and 15 of this record, that Government did assume such liability of its own accord and as a mere act of favor to the contractors, having previously denied that it was under any legal obligation so to do. The payments to be made under these acts were as therein stated for postal service "under contracts or appointments made by the United States Government before the Confederate States Government took charge of such service." This phrase occurs in both of the two acts of the Confederate Congress set forth in the record (pp.

14, 15), and was of course intended to cover all service performed to and including the 31st day of May, 1861. When the Congress of the United States came to legislate on the same subject by the act of March 3, 1877, they did so, as appears by the proviso to that act, with full knowledge of the Confederate laws in question, and with the intention of paying all claimants who had been prevented either by their loyalty to the United States, by negligence, or by any other cause, from making application to the Confederate Government for payment, and obtaining payment from that Government. Is it possible to suppose—is it honorable to this Government to suppose—that Congress meant not only to exact from contractors who had preferred to trust the United States for payment of its own debts rather than to apply to the Southern Confederacy, the loss of interest on their money, which amounts now to more than the principal, but also to pay them less as a *debt* than what the Confederate Government had offered as a mere *gratuity?* Certainly this Court ought not, unless absolutely compelled, to attribute such an intention to Congress.

In any view, however, which may be taken of the case, the claimants are unquestionably entitled to recover to the 19th of April, 1861, which is the earliest date at which this Court has ever held that there was any existing war between the United States and the States of the so-called Southern Confederacy.

4. The Question of Payment by the Confederate Government.

But the most important question arising in this case—and it is the one upon which the claim was defeated in the Court below—arises out of the proviso to the act of March 3, 1877, which provides "that any such claims which have been paid by the Confederate States Government shall not be again paid."

It will be observed that by the enacting clause of this statute Congress appropriated $375,000 to pay the claims of mail contractors for mail service rendered in certain States. The proviso takes out and excepts from the operation of the statute such claims as had already been paid by the Confederate Government. Now it is well settled in this Court that provisos to a statute are to be strictly construed, and that they take no case out of the operation of the enacting clause unless clearly proved to be within the exception of the proviso. This rule was stated by Justice Story in delivering the opinion of this Court in *United States* v. *Dickson*, 15 Pet. 141, where he says:

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any exception must establish it as being within the words as well as within the reason thereof." (See, also, *Minis* v. *United States*, 15 Pet. 423; *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *Huidekoper* v. *Burrus*, 1 Wash. C. C. 119; Potter's Dwarris on Statutes, 118.)

According to these decisions it is very clear that the claimant in this case having clearly shown itself to be within the enacting clause of the statute, it is for the defendant, if it alleges the claimant to be within the proviso, to put it within it if it can.

It is very clear that such would be the rule between private parties; for it is settled by all the authorities that payment, when alleged as a defense, must be proved by the defendant alleging it. The rule as to burden of proof is much discussed by Wharton in his treatise on Evidence;

and as the result of all the authorities he states the rule as follows (1 Wharton on Evidence, 356):

"He who in a court of justice undertakes to establish a claim against another, or set up a release from another's claim against himself, must produce the proof necessary to make good his contention."

The rule is so familiar and elementary as to ordinary cases where payment is pleaded or relied upon as a defense that it is hardly necessary to cite authorities in its support. Certainly, after a plaintiff has once made out his claim, it is the defendant's duty satisfactorily to establish payment of the debt; otherwise judgment will go against him.

This rule is not overcome in behalf of the Government by the peculiar circumstances attending this case, but is rather strengthened in its application.

It admits, to say the least, of the gravest doubt whether without the aid of the proviso to the act of March 3, 1877, the payment of a claim of this character by the "Confederate States Government," even if pleaded and proved by the United States, would constitute any defense to an action like the present. As a general rule, payment of a debt must be made by or on behalf of a debtor, and payment by an unauthorized third person under circumstances not constituting him an agent of the debtor to make the payment constitutes no discharge of the debt.

Chitty on Contracts thus states the rule (2 Chitty on Contracts, 11th Am. ed., 1095):

"The general rule as to payment or satisfaction, not by the debtor himself but by a third person, who is not liable as a co-contractor or otherwise, appears to be that it is not sufficient to discharge the debtor, unless it be made by such third person as agent for or on account of the debtor, and with his prior authority or subsequent ratification."

Of course this Court will not for a moment entertain the proposition that the Confederate Government was an agent

of the United States Government for the payment of this money, or for any other purpose. Hence a party who had received in full from the Confederate Government the amount due him under contract with the United States would not be thereby prevented from coming into the Court of Claims and suing the United States in the absence of any other legal defense, were it not for the proviso now under consideration.

But it is said in some of the opinions of the Court of Claims, and relied upon here as a defense on behalf of the Government, that the Government has shown the payment of this claim by the Confederate Government, to such an extent at least as to create a presumption that the claim has been paid, and thus to shift the burden of proof to the claimant and require him to establish that it has not been paid. The only evidence relied upon on behalf of the Government to make good this contention will be found on pages 14 and 15 of this record, where, under the head of "Presumption of Payment by the Confederate States," we find two acts of the Confederate Congress. The first of these acts, approved August 30, 1861, authorizes the Postmaster-General to collect moneys due from the several postmasters within the Confederate States, and which they had not paid over at the time the Confederate States took charge of the postal service; directs that the moneys so received shall constitute a fund for the *pro-rata* payment of claims for postal service which accrued before the Confederate Government took charge of the service; provides that the Postmaster-General shall make proclamation requiring all citizens of the Confederate States who may have rendered postal service in those States under contracts or appointments made by the United States Government before the Confederate Government took charge to present their claims to the Department verified and established on oath, and that the Postmaster-General shall, upon having collected the moneys and ascertained the amount of claims,

make report of the same for the future action of Congress. All claims were barred unless presented within 6 months from the date of such proclamation.

By the second act, approved September 27, 1862, the Postmaster-General was authorized and directed to proceed to pay to such loyal citizens of the Confederate States as had established their claims under the first act such sums as had been found due and owing them respectively. Whether this second act was intended to require the payment in full of the contract amounts for services performed, or whether it was to be a *pro-rata* payment, as provided in the first act, is not clear by its terms, and the record leaves us without light as to how it was construed in that regard by the Confederate authorities.

Not a word is contained in the record to connect this claimant with the enactment of the laws in question or with any proceedings under them. It is not shown to have had any knowledge of their existence, to have ever presented a claim under them, or to have ever received the benefit of the acts.

Surely such evidence as this is too loose and inconclusive to form the foundation of the judgment of a court of justice.

We are not left without light upon the views of this Court on the subject of remote and conjectural evidence of this character. In *Thompson* v. *Bowie*, 4 Wall. 463, where the issue was whether certain promissory notes dated on a particular day were given for money lost at play, it was shown that whenever the defendant was under the influence of liquor he had a propensity to gamble; that he was drunk on the morning the notes were given, and that they were in the handwriting of a professional gambler and payable to the keeper of a gaming-house. From these circumstances the jury was permitted under instructions of the court below to infer as a fair and reasonable conclusion from the facts stated that the notes were given for

money won at play. This Court held, however, that the evidence was of too remote and indirect a character to establish that the particular notes in question were given for a gambling consideration, and consequently reversed the judgment of the Court below.

So, too, in *United States* v. *Ross*, 92 U. S. 281, which was a case coming up from the Court of Claims, it was shown that the claimant owned in May, 1864, 31 bales of cotton then in a warehouse in Rome, Georgia; that on the 18th of that month Rome was captured by the United States forces; that shortly afterwards the cotton in question was removed on Government wagons to a warehouse adjoining the railroad leading from Rome to Kingston, and connecting there with a road leading thence to Chattanooga; that subsequently all of the cotton in that warehouse was shipped from the railroad to Kingston—the road being in the possession of the military authorities; that some cotton arrived in Kingston from Rome before August 19, 1864, and was forwarded to Chattanooga; that on the 19th of August 42 bales were received at Chattanooga from the quartermaster at Kingston; that thence they were shipped to Nashville, where they were received as coming from Kingston, turned over to the Treasury agent, and the proceeds of sale paid into the Treasury, and that no title to these 42 bales had been asserted by other persons. From these facts the Court deduced as a presumption of law that the 31 bales removed on Government wagons to the warehouse adjoining the railroad at Rome were a part of the 42 bales subsequently received at Nashville, and there turned over to the Treasury agent. This Court, however, said, "it is obvious that this presumption could be made only by piling inference on inference and presumption on presumption," and, after reviewing the evidence just set forth, proceeded (p. 283):

"These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact;

much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evid., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which the jury is to make is not a circumstance of proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglas* v. *Mitchell*, 35 Penn. St. 440."

But the case nearest in point to the present, and which seems to us most conclusively to settle this question in favor of the appellant, is the recent decision of this Court in *Xenia Bank* v. *Stewart*, 114 U. S. 224. The question in that case was whether a deceased person had furnished money to pay a certain note. In order to prove that he had not furnished the money, it was shown in evidence that he had been hopelessly insolvent and had experienced great difficulty in procuring means to meet his interest obligations. This Court, however, held that such evidence was inadmissible because too remote and conjectural. On that subject this Court remarked as follows (p. 231):

"The purpose of the evidence was to prove that Mc-

Millan had not furnished the money to pay his note for $2,600 held by Hyde. The evidence offered was inadmissible because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *United States* v. *Ross*, 92 U. S. 281; *Carter* v. *Pryke*, 1 Peake, 95; *Hollingham* v. *Head*, 4 C. B. N. S. 388; *Jackson* v. *Smith*, 7 Cowen, 717; *Baird* v. *Gillett*, 47 N. Y. 186; *Thompson* v. *Bowie*, 4 Wall. 463. In the case last cited, where the issue was whether certain promissory notes dated on a particular day were given for money lost at play, testimony was offered to prove that the party giving the notes was on the day of their date intoxicated, and that when intoxicated he had a propensity to game. It was held that the evidence was properly excluded.

"The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely, whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and leave some unpaid. Proof of the insolvency of a debtor is no more competent to show non-payment than proof of his solvency is competent to show the payment of his debts. These two kinds of proof stand on the same footing. The latter kind has been held to be incompetent. *Hilton* v. *Scarborough*, 5 Gray, 422. The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt. We think the evidence of the insolvency of McMillan was properly excluded."

It will be observed that the case of *Hilton* v. *Scarborough*, 5 Gray, 422, a decision of the Supreme Court of Massachusetts, here cited with approval, is on all fours with the present case. The solvency of the debtor was established in evidence for the purpose of showing that he had paid the particular debt in question; but the Supreme Court of Massachusetts decided that such proof was entirely inadmissible.

In this case all the evidence amounts to is that the Confederate Government was in funds to pay this debt, and might perhaps have been willing to pay it if application had been made by the claimant, and if it had established all the facts required by the Confederate statutes to be proved in order to obtain payment of the claim. The difficulty with the Government's case is its entire failure to show any such application ever having been made. Until this vital element of the Government's case is established, the mere passage of statutes by the Confederate Government shows nothing more than a remote possibility that payment might have been obtained. On such evidence as this it is very clear that no legal conclusion can be based.

We find no reasoning in any of the opinions of the Court of Claims tending to support such an extraordinary result as this, but only this statement of the conclusion reached, as found in the case of *Hukill* v. *United States*, 16 C. Cls. 562, where, after citing the Confederate statutes and analyzing their provisions, the Court concludes (p. 569):

> "In our judgment, the defendants, in any such case as this, are entitled to the benefit of the presumption that every United States mail contractor, on routes within the insurrectionary States, who came within the terms of those two laws, did receive full payment from the insurrectionary Government of all that had been earned by him under his contract prior to the time when the State in which his route lay declared its secession from the Union."

Such a conclusion, we submit, cannot be justified by any principle of the law of evidence.

It is submitted that upon this point the judgment of the Court of Claims is clearly erroneous, and that when the Government claims that any particular claimant has been paid for his services, it is incumbent upon it to establish the affirmative of that issue.

This Court need not have the slightest hesitation in deciding this question of presumption of payment in favor of

the claimant through any fear that the allowance of claims already paid by the Confederate Government will be thereby facilitated, owing to the difficulty or impossibility of the Government furnishing the requisite evidence of what claims have already been paid. It needs only a glance at the official published records of Congress, of which this Court will take judicial notice, to show the entire groundlessness of any apprehension on that point.

Senate Ex. Doc. No. 72, 48th Congress, 2d Session, contains a letter from the Postmaster-General to the President of the Senate transmitting one from the Attorney-General to the Postmaster-General forwarding with a favorable recommendation the following letter from the Assistant Attorney-General to the Attorney-General:

DEPARTMENT OF JUSTICE,
WASHINGTON, *February 10th*, 1885.

SIR: I have been requested to advise you of certain matters in my knowledge touching a record or records of the late Confederate States as bearing on a resolution pending before Congress, authorizing the Postmaster-General, among other things, to purchase the same from the parties in possession thereof.

A large number of suits have been pending in the Court of Claims, brought by parties who were postmasters or mail contractors in the seceding States, for compensation for alleged services during the period just before secession. In the defense I brought to the attention of the Court the fact that the Confederate Congress had made appropriations for the payment of this service, and the Court ruled that in such suits the claimant must show that he had not been so paid. Very few of the claimants have as yet been able to meet this burden of proof.

About a year since I had an opportunity in confidence to see the said records, and examined particularly a book which purported to contain a list of the payments made out of said appropriations by the Confederate post-office department and the names of the parties paid. Some leaves had been torn out, but I was satisfied that it was a genuine record of that department, and would be of great

use in the investigation of the claims now urged by such postmasters.

The pending resolution requires the Postmaster-General to investigate and pay these claims if they have not been paid before, as above stated, and gives him power to spend so much of the appropriation as he may see fit in getting evidence, a provision which has reference no doubt to the records in question.

For the reason above given the possession of these records is not of as much consequence to the defense as they would be to honest claimants; and as it is not the object of the Government to resist honest claims, I have no doubt that the purchase will tend to facilitate the settlement of such claims by the Post-Office Department.

A Mr. Johns, who represents the parties controlling the records, asked me to state the facts to you, on the ground that the Postmaster-General is intending to consult you in the matter, and that you should be informed of the state of the case.

Very respectfully,

THOMAS SIMONS,
Assistant Attorney-General.

THE ATTORNEY-GENERAL.

It thus appears that evidence on this point is within reach of the Government; and the necessary appropriation for securing it will doubtless be made by Congress if convinced by decision of this Court of the necessity for it. In fact, resolutions re-appropriating and making available the $375,000 appropriated by the act of March 3, 1877, were reported in the 48th Congress favorably in both Houses of Congress—in the Senate by report No. 322 of the 48th Congress, 1st Session, and in the House by report No. 1051, same session. Each of these resolutions provided that the Postmaster-General might expend such part of the appropriation as he might deem proper in procuring proof to protect the United States against overpayments or fraud in the premises. These resolutions, however, failed to pass, and hence it is that this claimant

is now before this Court seeking the long-delayed payment of its indebtedness.

The claimant has claimed in its petition one month's extra pay for discontinuance of the service by the United States. This part of the claim would seem to be supported by the decision of this Court in *Reeside* v. *United States*, 8 Wall. 38.

We respectfully submit in conclusion that the judgment of the Court of Claims should be reversed and the cause remanded with directions to enter judgment in favor of the claimant for the five months of service from January 1, 1861, to May 31, 1861, amounting to $5,000, from which is to be deducted the sum of $95.19, already paid, leaving due a balance of $4,904.81. If there be added to this sum one month's extra pay ($1,000) for discontinuance of the service, the balance due will be $5,904.81.

Respectfully submitted,

GEORGE A. KING,
WM. W. BELKNAP,
Attorneys and of Counsel for Appellant.

Office Supreme Court, U. S.
FILED,
FEB 28 1891
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, appellant,
vs.
THE UNITED STATES. } No. 12.

BRIEF ON BEHALF OF THE UNITED STATES

JOHN B. COTTON,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, appellant,
vs.
THE UNITED STATES. } No. 12.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The Alabama and Tennessee Rivers Railroad Company, a corporation chartered by the State of Alabama, formerly operated a line of railroad between Selma and Talladega, wholly within the State of Alabama.

On the 10th day of July, 1858, this corporation entered into a contract with the United States to carry the mail between Selma and Talladega for the sum of $12,000 a year. This contract is set forth in full on page 3 of the transcript of record. Under this contract

the corporation carried the mail and received its pay from the United States up to the 1st day of January, 1861.

Finding I, page 6, transcript of record, shows that the Alabama and Tennessee Rivers Railroad Company carried the mails of the United States under said contract continuously from January 1, 1861, to May 31, 1861. An additional finding of fact on page 16 of the transcript of the record shows that the Alabama and Tennessee Rivers Railroad Company carried the mails for the Confederate States Government, between Selma and Talladega, in the State of Alabama, in the year 1861; that said mail service commenced immediately after the said company ceased to carry the mails for the United States. It received full compensation according to the terms of contract up to the 1st day of January, 1861. For the period between January, 1861, and May 31, 1861, it received on the contract the sum of $95.19, so that it was entitled at that date to the sum of $4,904,81, had no circumstances intervened to disrupt the relations between the parties.

There is no finding of fact relative to the history of the Alabama and Tennessee Rivers Railroad Company from May 31, 1861, till the 8th day of February, 1867, a period of almost six years. On the 8th day of February, 1867, the legislature of Alabama passed an act, which was approved on that date, for the consolidation of railroads, known as the Dalton and Jacksonville Railroad Company, and the Georgia and Alabama Railroad Company, of the State of Georgia, with the Alabama and Tennessee Rivers Railroad Company aforesaid. The act of the legislature is found on page 6 of the transcript of the record.

In the second finding of fact, page 7 of the transcript of the record, it appears that the companies named in this act accepted its terms and consolidated under the name of the Selma, Rome and Dalton Railroad Company, which is the claimant in this case.

It does not appear from the findings of fact that at the time of the consolidation of these several railroad companies the assets of either company were transferred to and became the property of the Selma, Rome and Dalton Railroad Company; nor does it appear in the findings of fact that either the Alabama and Tennessee Rivers Railroad Company or the Selma, Rome and Dalton Railroad Company, prior to the beginning of this suit, made demand upon the defendant for the payment of the sum herein alleged to be due.

Before March 3, 1877, and since March 2, 1867, it would have been unlawful for any officer of the United States to pay the claim in suit. (Vide R. S., sec. 3480). On the 3d day of March, 1877, the Congress of the United States, in an act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1878, and for other purposes, made an appropriation of $375,000 to "pay the amount due to mail contractors for mail service performed in the States of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, Tennessee, Virginia, and West Virginia, in the years 1859, 1860, and 1861, and before said States, respectively, engaged in war against the United States;" and that the provisions of section 3480 of the Revised

Statutes, being the act of March 2, 1867, before referred to, should not be applicable to the payment therein authorized, "provided that any such claim that has been paid by the Confederate Government shall not be again paid."

It is found by the Court of Claims, Finding V, that at an early date after the passage of the sundry civil appropriations act of March 3, 1877 (19 Stats. L., 344, 362, ch. 105), which contained the appropriation referred to, that the Secretary of the Treasury issued an order that no payments should be made out of that appropriation until all claims covered by its terms should be received and adjusted, and if the appropriation should prove insufficient, then they should be paid pro rata. In consequence of this act, no claims were adjusted within two years of the date of the act, and the appropriation was therefore covered into the Treasury under the requirements of section 5 of the legislative, executive, and judicial appropriation act of June 20, 1874. (18 Stats. L., ch. 328, p. 85.)

The claim in this suit is for five months' pay under the contract of 1858, at the rate of $1,000 per month, less the sum of $95.19, and in addition thereto, the further sum of $1,000 penalty under the contract for the suspension of the mail service thereunder.

The petition of the claimant in the Court of Claims was dismissed and the judgment of affirmance was on the 7th day of March, 1887, entered by this court, the same resulting from the equal division among the judges. On motion of the claimant, the case was ordered to be reargued before a full court.

STATEMENT AND BRIEF OF ARGUMENT FOR APPELLANT.

ANSWER OF THE DEFENDANT.

The defendant says in answer to the claim of the Selma, Rome and Dalton Railroad Company :

That the Selma, Rome and Dalton Railroad Company has no standing in court to maintain any action against it on account of this claim, because—

I.

The act of March 3, 1877 (19 Stat. L., 362), did not confer jurisdiction on the Court of Claims to hear and determine this claim.

II.

The claim was, at date of the petition, barred by the statute of limitation. (Sec. 1069, Rev. Stat.)

III.

It does not appear in the findings of fact that prior to the bringing of this suit the defendant had notice that the Selma, Rome and Dalton Railroad Company was the owner of the debt sued for, or that the Alabama and Tennessee Rivers Railroad Company or the claimant had ever demanded the payment thereof.

IV.

The claimant neither is nor was such owner of the debt sued for by virtue of the act of consolidation between the several railroad companies forming the consolidated company, known as the Selma, Rome and Dalton Railroad Company.

V.

If there is any finding of fact that said Selma, Rome and Dalton Railroad Company owned such claim by virtue of any agreement with the Alabama and Tennessee Rivers Railroad Company, then such agreement is in the nature of an assignment of said claim, and is void as against the United States by virtue of section 3477 of the Revised Statutes.

VI.

The burden of proof to show that the claimant or the Alabama and Tennessee Rivers Railroad Company did not receive the pay for the services, rests upon the claimant, and it has failed to sustain the same.

VII.

In no event can claimant be entitled to receive pay after January 4, 1861, when the State of Alabama first "engaged in war against the United States——

I. THE ACT OF MARCH 3, 1877 (19 STAT. L., 362), DOES NOT CONFER JURISDICTION ON THE COURT OF CLAIMS TO HEAR AND DETERMINE THIS CLAIM.

II. THE CLAIM AT THE DATE OF THE PETITION WAS BARRED BY THE STATUTE OF LIMITATIONS. (SEC. 1069, REV. STAT.)

1. This claim is one of a class of contract debts which first accrued against the United States in the year 1861.

2. These debts were not confiscated by the United States; hence, such of them as were not paid by the Confederate

States Government or by the Department of the Treasury of the United States, are still existing debts of the United States.

3. The remedies for the recovery of judgments in the Court of Claims for these debts were suspended during the whole period of the late rebellion. The right to pursue these remedies on the part of the creditors was restored to each and all of them, or their legal representatives when the rebellion ceased, and peace, with amnesty, was proclaimed.

The basis of this claim is an express contract under seal, entered into July 10, 1858, between the United States and the Alabama and Tennessee Rivers Railroad Company, for mail service. (Record, p. 3.)

It is a claim "founded" on contract within section 1059, Revised Statutes, conferring general jurisdiction upon the Court of Claims.

Whatever debt is due from the United States to the Alabama and Tennessee Rivers Railroad Company accrued to that company before the State of Alabama engaged in war against the United States.

Is the debt which accrued to the Alabama and Tennessee Rivers Railroad Company an existing claim, if it was not paid by the Confederate States Government?

It is submitted that it is now, and has been since its creation, a debt due from the United States, unless it has been paid, confiscated, or otherwise settled.

No law of the United States, no usage or practice of war, operated as a confiscation of debts of this class. In *Hanger* v. *Abbott* (6 Wall., 539) the Supreme Court say:

"Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it the right and the remedy." The right here referred to is the right to sue for the recovery of the debts (*Ib.*, 539). Neither the right to sue, nor the remedy to make the suit effective, is destroyed by the usage or practice of civilized nations in time of war. The right and the remedy are only suspended during the war (*Ib.*) "The rule of the present day is that debts existing prior to the war, but which made no part of the reasons for the war, remain entire, and the remedies are revived with the restoration of peace" (*Ib.*, 540). This is the accepted American rule, both State and Federal.

In the absence of an actual confiscation, that rule applies to all contract debts of the United States which accrued prior to the war in the States named in the appropriation made by the act of March 3, 1877, for the payment of the claims of the *ante bellum* mail contractors. The rule of war, or the statute (if any) that suspends jurisdiction for the recovery of such debts does not impair the obligations of the contract, "because it does not involve the obligation of a contract or of any vested right" (*Corbett's Case*, 1 C. Cls. R., 139). This doctine was affirmed by the Supreme Court in *De Groot's Case* (5 Wall., 419). The debts that accrued on the mail contracts in 1861, in the States that attempted to secede from the Union, not having been confiscated, and not having been paid, must be regarded as continuing and existing since that year.

To say that this claim was revived in 1877 is to say it had no legal existence in 1876.

Had an unpaid *ante bellum* mail claimant been sued in 1876 by the United States in a court of proper jurisdiction for an *ante bellum* debt, could he not, by laying the proper foundation for a plea of set-off, as prescribed and provided in the act of March 3, 1797 (1 Stat. L., 515; 5 Stat. L., 82; Rev. Stats., 951, 952, 957, 958), have pleaded the debt due him by the United States for *ante bellum* mail service? (*Bevans* v. *United States*, 13 Wall., 56; *Halliburton* v. *United States*, *ib.*, 63; Brightly's, Federal Digest, p. 777, ed. of 1868.)

Ante bellum mail contracts required no new legislation for their existence; no new promise to pay them in order to revive them.

The Court of Claims has recognized the doctrine of the existence of claims against the United States after the remedy for their enforcement has ceased to exist. (See *Webb* vs. *United States*, 20 C. Cls. R., 498.) This court in *Klein's Case* (13 Wall., 129) held that "the property of the original owner was in no case absolutely divested."

Of however long standing, the debt can not be regarded as non-existing until confiscated, paid, or otherwise settled. The right of petition to Congress always remains.

Congress regarded the *ante bellum* mail claims as existing in 1877, when the appropriation was made for their payment.

The act of March 3, 1877, expressly provides for the payment of mail service performed prior to the war of the rebellion. It recognizes the fact that debts then accrued for mail service of this class and that some of these debts might have been paid by the late Confederate States Gov-

ernment. The appropriation in that act was not for a debt newly created, nor was it for a debt that was defunct. Neither was this appropriation a "promise" to pay these debts. It was a *performance* of payment, as far as the legislative branch of the Government was concerned. Congress appropriated the money and commanded the proper accounting officers of the Treasury to perform the duty of paying the debts provided for. The fact that these officers failed or neglected to perform this duty in the mode prescribed by section 236, and Chapters III and IV, Title VII, of the Revised Statutes, and that they still fail and neglect to do so, constitutes no part of any promise or assumpsit of which the Court of Claims can take jurisdiction. No promise can be implied from the act of March 3, 1877, unless it be a promise that the "officers" who were forbidden by section 3480 of the Revised Statutes to pay such debts would proceed to examine, adjust, and settle these old claims. The rule in *Deming's Case* (1 C. Cls. R., 190, 383) is conclusive that a contract can not be affected by such general legislation as that of section 3480 of the Revised Statutes.

Although these debts are still existing, and authority is now conferred on the executive branch of the Government to pay them, this of itself is not sufficient authority for the Court of Claims to take jurisdiction of such debts. This position is supported by the doctrine that no State can be sued without its consent. The United States yields this prerogative in certain cases cognizable in that court, with the *proviso* that the suit must be brought within six years after the claim *first* accrued. In such cases, after the lapse of the six years, the Government resumes its pre-

rogative of exemption from suit, and a further waiver is not to be presumed in the absence of an express law. Statutes which confer the right to sue the State are in derrogation of this prerogative; and although they are to be liberally construed as to their remedies, they are to be strictly construed as to the grant of jurisdiction. The intent of the statute must, to say the least, be reasonably clear as to the grant of jurisdiction after a claim is barred, for it is a well-settled rule of construction that the State is not bound by general statutory provisions whereby any of its prerogatives, rights, titles, or interests would be impaired, unless such intent be shown by express words of the statute (*Jones's Case*, 1 C. Cls. R., 383; Bishop on the Written Law, sec. 103). The waiving of exemption from suit by the State for a limited period of six years is merely a temporary abdication of one of the prerogatives of its sovereignty for that period only.

The act of March 3, 1877, can not be considered as a new promise for which the ancient debt is a sufficient consideration because the ancient debt was not regarded as defunct by that act, but as a claim that, in the opinion of Congress, could not be enforced in the Court of Claims.

It was for an *existing* claim that the appropriation was made.

Where this intention is so clear there is no need of raising a totally different claim by construction, so as to bring the latter within the jurisdiction provided by section 1059 *supra*, as a claim founded on a law of Congress.

The inability to enforce a claim * * * is not inconsistent with its existence. (*The Siren*, 7 Wall., 156, 158.)

When the appropriation act of March 3, 1877, was passed, the only bar necessary to be removed for that purpose was section 3480, Revised Statutes.

The mere acknowledgment of a liability by making an appropriation of money and conferring authority on the executive branch of the Government to pay does not extinguish the contract debt, like the obtaining of a judgment, nor does it create a new claim of which the Court of Claims can take jurisdiction. (*Great Western Insurance Company* v. *The United States*, 112 U. S. R., 193.)

If such an appropriation act creates an "assumpsit" of which the Court of Claims can take jurisdiction when the Treasury officials neglect to pay, it would seem to follow that the jurisdiction of the Court of Claims would extend to any item or class of items included in deficiency bills, however stale the claim might be, whether such claim were or were not those of which that court had jurisdiction by section 1059, Revised Statutes.

If the intention of Congress to pay a claim is to be of the controlling criteria of jurisdiction of the Court of Claims, that intention emphatically appears in every appropriation act; and, it is respectfully submitted, that there can be no principle in assuming jurisdiction of any class of items, and declining it for any one item, that is not too refined for general application.

CASES THAT DO NOT APPLY TO THE PRESENT QUESTION.

In *Hukill's Case* (16 C. Cls. R., 562) the claim was presented to the Auditor of the Treasury for the Post Office Department as early as March 15, 1869. This was within

six years after the insurrection in Arkansas ceased; and, therefore, under the rule in Lippett's case (cited in *Chesapeake and Ohio Railroad Company* v. *United States*, 20 C. Cls. R., 69) the Court of Claims had jurisdiction of Hukill's claim. True, the court held in Hukill's case that they had jurisdiction "to hear and determine all claims founded upon any law of Congress." This jurisdiction can not be questioned. It is expressly granted in section 1059 of the Revised Statutes. But it is now contended that these *ante bellum* claims do not come within that part of the grant of jurisdiction; but, on the contrary, that they fall within that description of claims that are founded on express "contract," and of which this court is given jurisdiction as a power distinct from that granted to take jurisdiction of claims founded "upon any law of Congress."

The *Syphax Case* (7 C. Cls. R., 529) was decided on a specific appropriation to him by name, and it does not appear that the *assimilated compensation* so granted was for a claim of which the Court of Claims had jurisdiction at any time before the passage of the appropriation act.

It might be contended that the Court of Claims had jurisdiction of *ante bellum* claims upon the principle stated in *United States* v. *Clark* (96 U. S. R., 37), and *Scott* v. *The United States* (18 C. Cls. R., 7), on the theory that the claims now presented are matters of accounting (Rev. Stats., 277, claim 7); and that the act of 1877 removed the prohibition against settling the contractors' accounts which was imposed on the Sixth Auditor of the Treasury by section 3480 of the Revised Statutes, and therefore that

the statute of limitation would not run until after the Sixth Auditor had refused to allow the credit asked by the mail contractor, or perhaps not until "twelve months" after such refusal (Rev. Stat., 270).

The answer to this suggestion is that "all claims against the United States" are the subject-matter of an account (Rev. Stats., 236, and chapters 3 and 4, Title VII) that is to be "settled and adjusted" by the proper accounting officers of the Treasury. The judgments of this court for money in favor of a claimant become matters of accounting before they can be paid.

This theory, then, would involve an absurdity, because if a claim which is, or must eventually become, a matter of account in the Treasury Department is not barred by the statute of limitation until it is rejected, or until credit for it is refused, the statute of limitation would be void and of no effect.

What can not be done directly can not be done indirectly.

This claim does not appear to come within the ruling of the Court of Claims in *Meldrum and Doyle's case* (7 C. Cls. R., 595), for in that case Doyle's cotton was confiscated by a seizure under the act of Congress and all rights to the proceeds were divested.

The doctrine stated in *United States* v. *Lippett* (100 U. S. R., 663) does not apply to the question now raised. Lippett's claim first accrued in 1864. It was presented to the War Department in 1865, and its settlement was pressed for until January 9, 1878, on which day it was transmitted to the Court of Claims by the Secretary of

War under the provisions of the act of June 25, 1868. It was not barred by the statute when it was first presented.

The ruling of the Supreme Court in *Taylor's Case* (104 U. S. R., 216) was that under the statutes which provided for a payment to the claimant there was no limitation of the time for presenting his demand at the Treasury Department. The money claimed was a trust fund, and the court recognized the general rule "that when a trustee unequivocally repudiates the trust and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the statute of limitation will begin to run against him from the time such knowledge is brought home to him, and not before" (*Ib.*, 222). In all cases to which this general rule will apply in the Court of Claims it will, like the rule of war, although not expressed in section 1069 of the Revised Statutes, be considered as incorporated in the proviso of that section.

The appropriation made for the payment of mail contractors' claims by the act of March 3, 1877, never had any of the characteristics of a trust fund.

That act, like section 3480, Revised Statutes, is addressed to the accounting and disbursing officers of the Treasury Department. It is remedial.

The section which forbids the "officers" to pay these claims and the section which allows them to pay them are in *pari materia*, and are to be construed together in explaining their meaning and import.

As the prohibitory section of the Revised Statutes did not restrict the jurisdiction of the Court of Claims, it follows that the permissive section of the appropriation act did not confer jurisdiction beyond the six *years' limitation that had elapsed.*

Unless there was some special legislation or some peculiar condition of public affairs which interfered with, suspended, or modified the course of procedure, the Court of Claims was open to all persons and corporations seeking to enforce claims founded upon any contract with the United States from the time of performing the service in this case until March 3, 1877.

Every contract right could then have been enforced.

Ample opportunity between the end of the war of the rebellion and the institution of this suit existed during which the jurisdiction of the court could have been invoked.

If the claimant has omitted to take advantage of this right, it has only itself to blame for so doing.

III. IT DOES NOT APPEAR IN THE FINDINGS OF FACT THAT PRIOR TO THE BRINGING OF THIS SUIT THE DEFENDANT HAD NOTICE THAT THE SELMA, ROME AND DALTON RAILROAD COMPANY WAS THE OWNER OF THE DEBT SUED FOR; OR THAT THE CLAIMANT OR THE ALABAMA AND TENNESSEE RIVERS RAILROAD COMPANY HAD EVER DEMANDED OF THE DEFENDANT PAYMENT OF SUCH DEBT.

The findings of fact disclose no evidence whatever that the defendant was notified that this claimant was the owner of the debt, or that the claimant or the Alabama and Tennessee Rivers Railroad Company ever demanded its payment.

Opportunity was given the legal owners of this class of claims to present them to the Treasury Department. The fifth finding of fact, page 16, record, shows that the Secretary of the Treasury "issued an order that no payments should be made out of that appropriation until all claims, covered by its terms, should have been received and adjusted, and if the appropriation should prove insufficient they should then be paid pro rata."

No excuse is suggested by the findings of fact for the omission on the part of claimant.

It had no right to assume that the claims would have to be paid pro rata. If the order of the Treasurer was unlawful it was still claimant's duty to present the claim, and if finally found entitled to recover the measure of the amount would have been a proper matter for the consideration of the court having jurisdiction of the claim.

It is manifestly unjust that the defendant be sued upon a claim the existence of which in this claimant's possession it had no knowledge.

A demand is a legal pre-requisite to a recovery in the name and for the benefit of this claimant.

IV. THE CLAIMANT NEITHER WAS NOR IS THE OWNER OF THE DEBT SUED FOR BY VIRTUE OF THE ACT OF CONSOLIDATION BETWEEN THE SEVERAL RAILROAD COMPANIES FORMING THE COMPANY KNOWN AS THE SELMA, ROME AND DALTON RAILROAD COMPANY.

This claim can not be maintained in the name of the Selma, Rome and Dalton Railroad Company.

The claim did not originally accrue to this claimant.

The Selma, Rome and Dalton Railroad Company had no existence till long after the services were rendered.

The claimant's right to maintain this action depends upon one of two sources: (*a*) By the act of the legislature of Alabama of February 8, 1867; or (*b*) by the terms of some assignment, the existence of which is not expressly stated in the findings, and which can only be implied from the statement at the close of the finding (II) that the "companies named in this act accepted its terms and consolidated under the name of the Selma, Rome and Dalton Railroad Company, which is the claimant in this case."

The general statute of Alabama (Acts of Alabama, 1868, p. 469) relative to the consolidation of railroad companies was not enacted till December 29, 1868, and in no way made valid prior acts of consolidation.

Did the act of the legislature of Alabama of February 8, 1867, transfer to this complainant the property, including choses in action, of the Alabama and Tennessee Rivers Railroad Company?

In the brief of the claimant citation is made (p. 3) of the act of the legislature of Alabama of February 20, 1866, authorizing the Alabama and Tennessee Rivers Railroad Company to consolidate with other companies. No reference to this act is found in the findings of the court. It has no probative force whatever, for it is found by the court that the consolidation took place under an entirely different statute, namely, that of February 8, 1867. By the terms of this last-named act, which comprise a single section, "the consolidation as agreed on by and between said companies, so as to form one consol-

idated railroad company, etc., be, and the same is hereby, ratified and approved." The consolidated company is—

> Empowered to adopt as its corporate name and seal that of the Selma, Rome and Dalton Railroad Company, and
>
> To adopt the charter of the Alabama and Tennessee Rivers Railroad Company as now existing, and
>
> Under and by said name and style may and shall lawfully have, possess, enjoy, and exercise all its rights, functions, powers, and privileges, and shall be subject to all lawful liabilities, and responsibilities incurred or contracted by said consolidated company:
>
> *Provided, always,* That nothing in this act shall be construed as to release either of said companies from any obligation or liability incurred or contracted by them or either of them prior to their said consolidation.

It is plain that the act of the legislature in terms, first ratifying some *undisclosed* agreement between the said companies, transferred the *persona* of the companies *only* to the consolidated company. In terms the consolidated company was subject only to liabilities and responsibilities contracted by it thereafter, while the obligations and liabilities of the original companies remained upon them. There was by its terms absolutely no transfer of the assets of the several companies; the original companies for certain purposes still existing.

It is contended on behalf of the claimant that the Selma, Rome and Dalton Railroad Company, by virtue of the consolidation, succeeded not only to the franchise, but also to all the property rights of the Alabama and Tennessee

Rivers Railroad Company, and as such successor became entitled to maintain an action for this claim.

This proposition the defendant denies. We claim that the record does not disclose any transfer of this claim to the claimant.

That there was a consolidation of the several corporations is found by the Court of Claims. But whether such consolidation transferred to this claimant this claim against the United States is the important question.

> In determining the consequences of a consolidation upon the contracts and property of a corporation, it is important to distinguish between the *function of the legislature* and of the *corporators* in effecting the consolidation.
>
> A State has no power, under the constitutional limitations, to impair the obligation of contracts, or to take away private property without making just compensation. It follows, therefore, that whatever effect a consolidation may have upon existing property and contract rights, no material alteration can be brought about without the consent of the parties interested. (Morawetz on Private Corporations, 952, 2d ed.)

The effect of consolidation comes from two sources: (*a*) the enabling act, either a general law, or a special act as in the case at bar; (*b*) the terms of the agreement entered into between the several corporations, either by the directors, as is often provided by the legislature, and ratified by the stockholders, or by the stockholders directly.

The legislature transfers the *persona*, the stockholders the property.

What property is passed depends on the agreement. This proposition is clearly stated by Justice Gray in

Wabash, St. Louis & Pacific Railway Co. v. *Ham* (114 U. S. R., 587, 595).

> But upon the consolidation, under express authority of statute, of two or more solvent corporations, the business of the old corporations is not wound up nor their property sequestrated or distributed, but the very object of the consolidation and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation or are continued in existence under a new name and with new powers, and whether in either case the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depends upon the terms of the agreement of consolidation and of the statutes under whose authority that consolidation is effected.
>
> (See *Nashua and Lowell Railroad Corp.* vs. *Boston and Lowell Railroad Corp.*, 136 U. S., 356.)

The claimant, page 15 of the brief, quotes at length from Green's Brice's Ultra Vires, page 637.

The first case cited is *Paine* v. *Lake Erie and Louisville Railroad Company* (31 Ind., 283). An examination of this case shows that it depended on two statutes of Ohio. That of May 1, 1852 (50 Vol. Stat. of Ohio, 274), provides, sec. 21, that two or more companies may enter into an *agreement*, under the corporate seal, for consolidation of said two or more corporations, *prescribing* the *terms* and *conditions* thereof, etc.

The act of May 1, 1856 (53 Vol. Stat. of Ohio, 143), provides—

> (1) That the directors of several corporations may enter into a joint agreement, under the corporate seal

of each company, for the consolidation of said companies, and *prescribing* the *terms* and *conditions* thereof.

(2) This agreement must be ratified by the stockholders.

(3) Upon the making and perfecting the agreement, the act as provided in the preceding section and filing the same or a copy with the secretary of state, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, etc.

* * * * *

(5) Upon the election of the first board of directors of the corporation created by *said agreement of consolidation*, and by the provisions of this act, all and singular the rights, privileges, and franchises of each of said corporations parties to the same, and all the property, real, personal, and mixed, and debts due on account of subscriptions of stock or other things in action, shall be deemed to be transferred and vested in such new corporations without further act or deed, etc.

The supreme court of Indiana, in passing upon this case, had before it the agreement referred to in this statute, and its language must be taken in reference to these facts. In the case of *Miller* vs. *Lancaster*, 5 Cald. (Tenn.), 514, also cited as authority to consolidate (Laws of Tenn., 1853–1854, sec. 5, p. 19), provides that—

> They may become united into one board and body corporate, upon such terms and conditions as may be agreed upon, under the name and style, etc.

In the case of *Columbus, Chicago and Indiana Central Railway Company* vs. *Powell, adm'r.* (40 Ind., 37), the

question was as to the liability of the consolidated roads for damages caused by the consolidated roads, and they were held liable. So also the case of the *Chicago, Rock Island and Pacific Railroad Company* vs. *Moffitt* (75 Ill., 524.)

In *Thompson, appellant,* vs. *Abbot et al.* (61 Mo., 176), cited, which was an action for salary of a teacher after the merger of two school districts, the court laid down the broad principle:

> Now, where one corporation goes entirely out of existence by being annexed to or merged in another if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, and the subsisting corporation will be entitled to all the property and answerable for all its liabilities.

No cases are cited in support of the opinion of the court. It will be noted that in the case at bar an *agreement* of some kind was in fact made; but no finding as to its nature is disclosed.

In the case of *Lightner* vs. *The Boston and Albany Railroad Company* (1st Lowell, 338) it was held that the—

> Boston and Worcester Railroad Company, which was consolidated with the Western Railroad Corporation, under the authority of an act of the legislature of Massachusetts, which vested in the new corporation called the Boston and Albany Railroad Company all the powers, rights, franchises, etc., of the old corporation, might lawfully use a patented axle-box, which both the old and new corporations had been licensed to use.

The examination of this case shows that the legislature of Massachusetts, by the act already referred to, granted to the Western Railroad Company, whose road then extended only to Worcester on the east, the right to buy a road, property, and franchises of any other railroad entering into Boston, or to unite and consolidate its stock with such company, and especially with the Worcester Railroad Company to make a new and independent line of railroad from Worcester to Boston.

In *Zimmer* vs. *State* (30 Ark., 677) no question of the transfer of property arises. It was decided that—

> Where, by consolidation, two or more railroad companies form a new or consolidated company, the latter, unless restricted by the law under which the consolidation takes place, succeeds to all the rights, privileges, and immunities and franchises of the several companies forming it.

The next case cited by the claimant is the *Philadelphia, Wilmington and Baltimore Railroad Company* vs. *Maryland* (10 Howard, 376). The court decided that the charter of the Baltimore and Port Deposit Railroad Company, taken in connection with the acts of the assemblies of Maryland, Delaware, and Pennsylvania, which united them and the two other companies into one corporation, did not exempt from taxation the property which belonged to the first-named corporation. This case does not sustain the contention of the claimant. The right in question was derived from the legislature, and was a part of the franchise of the railroad. The court further say on page 393:

> Now, as these companies held their corporate privileges under different charters, the evident meaning of

> this provision is that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which makes the new corporation responsible for the contracts, debts, obligations, engagements, and liabilities at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal, and mixed, *choses in action*, etc., belonging to or due to the several companies.

This court, however, gave effect to the decisions of the court in Indiana upon this point, which are based upon the statute already quoted, citing *McMahan* v. *Morrison* (16 Ind., 172).

In *Tomlinson* vs. *Branch* (15 Wall., 460) is the application of the same principle as in the case of the *Philadelphia, Wilmington and Baltimore Railroad Company* v. *Maryland*, *supra*.

Attention is called to the difference between the act in the case at bar and that in the case of *Tomlinson* vs. *Branch*. In the latter case the act is as follows:

> That whenever the written consent of all the stock holders of the South Carolina Canal and Railroad Company shall have been obtained, the South Carolina Canal and Railroad Company shall be merged into the said South Carolina Railroad Company, and thereupon and thereafter all the rights, privileges, and property belonging to the said South Carolina Canal and Railroad Company, etc.

The case of *Nugent* vs. *Supervisors* (19 Wallace, 241) is not an authority sustaining the contention of the claimant. This was an action against a subscriber to stock. The reason of the decision is found on page 249:

> The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the State, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. The act further declared that the consolidated company should have all the powers, franchises, and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained, in its eleventh section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the State, or any other State which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was therefore contemplated by the legislature, as it *must have been by all of the subscribers to the stock of the company*, that precisely what has occurred might occur.
>
> Subscribers must be presumed to have known the law of the State, and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisers, in pursuance of that sanc-

> tion, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made; that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowlege, and in view of such contingencies, they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed other than they contemplated at the time as possible and legitimate. It can not be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently, the rule is inapplicable.

The case of *County of Scotland* vs. *Thomas* (94 U. S. R., 682), cited by the claimant, only decides that—

> The power of counties to subscribe, being thus held to be the rights and privileges of the company, in our opinion passed with all other rights and privileges into the new condition of existence which the company assumed under consolidation.

In other words this was a right properly conferred by the legislature. It was not in the nature of an asset.

The case of the *Chesapeake and Ohio Railroad Company* vs. *Virginia* (94 U. S. R., 718) related to the question of taxation and followed the case already cited. (See p. 725, *id.*)

The claimant calls attention to the case of the *Chesapeake and Ohio Railroad Company* vs. *United States* (20

C. Cls. R., 49). No question concerning consolidation appears in this case. It is expressly stated by the court (page 64) "that the Chesapeake and Ohio Railroad Company, the claimant, carried the United States mail from 1859 to June 1, 1861."

Claimant's brief states that "the point was evidently brought to the attention of the court." Certainly no mention is made of this matter either in the statement of facts or in the opinion of the court.

The case of *Green County* vs. *Conness* (109 U. S. R., 104) is also cited. On page 105 of this case is found the following:

> In the "finding of facts" made by the court, it is amongst other things found as follows:
>
> "That under the provisions of an act of the general assembly of the State of Missouri, approved May 11, 1867, entitled, etc., the said corporation then known as the Kansas City and Cameron Railroad Company, on the 21st day of February, in the year 1870, was consolidated with the Hannibal and St. Joseph Railroad Company, and all the rights, privileges, franchises, and property of said Kansas City and Cameron Railroad Company were by said consolidation transferred to the Hannibal and St. Joseph Railroad Company, which then and thereby became the owner of and possessed of the same."

Thus appears what does not appear in the case at bar, that the "property" was transferred with the franchise.

The last case cited by the claimant as sustaining its contention is that of *Tennessee* vs. *Whitworth* (117 U. S. R., 139). Like other cases cited, this case is one respecting

taxation. Chief Justice Waite stated the issue on page 145, which is as follows:

> The question whether the capital stock of the Nashville and Decatur Company is entitled to the same exemption as that of the Nashville and Chattanooga Company depends: 1, on whether the grant to the Tennessee and Alabama Company of "all the rights, powers, and privileges" of the Nashville and Chattanooga Company carried with it to the new companies the exemption from taxation provided for in section 38 of the Nashville and Chattanooga charter, and, if it did, 2, whether the Nashville and Decatur Company and its stockholders are entitled to the same exemptions as the original Tennessee corporations and their stockholders had.

The result of all these cases, save that of *Thompson, appellant*, vs. *Abbott et al.* (61 Mo., 176), may be thus stated:

That wherever the right or privilege in question has been granted by the legislature it passed to the consolidated or new company by virtue of the act itself.

When property or assets of the constitutent corporations has passed to the new corporation, it has been by the agreement of the several corporations as a distinct act.

Referring to the case at bar, it is plain that no property was passed or attempted to be passed by the act of February 8, 1867.

If any property rights of the Alabama and Tennessee Rivers Railroad Company passed to the Selma, Rome and Dalton Railroad Company, there is no evidence whatsoever before this court of that fact.

There is absolutely nothing which shows that the claimant company had either a legal or equitable interest in *this* claim, and consequently it must fail for want of such interest.

V. IF THERE IS ANY FINDING OF FACT THAT THE CLAIMANT OWNED THE DEBT SUED FOR BY VIRTUE OF ANY AGREEMENT WITH THE ALABAMA AND TENNESSEE RIVERS RAILROAD COMPANY, THEN SUCH AGREEMENT IS IN THE NATURE OF AN *ASSIGNMENT* OF SUCH CLAIM, AND IS VOID AGAINST THE UNITED STATES BY VIRTUE OF SECTION 3477 REVISED STATUTES.

Is the claimant the assignee of this claim?

If the right to maintain this action did not accrue to this claimant by virtue of the act of the legislature of February 8, 1867, then the only other suggested source of such right is an agreement of some character between the consolidating companies. If by virtue of the agreement, what were its terms? Did it profess to assign to the consolidated company this claim? Concerning these facts the findings of the court are entirely void.

The Court of Claims found that the companies named in the act "accepted its terms and consolidated." These acts were subsequent to the enactments. Neither the acceptance nor the consolidation have any relation to the agreement, except it be to carry out certain contracts of which the court has absolutely no information. But if this court can, by inference, find as a matter of fact, from this transcript of record, that the Alabama and Tennessee Rivers Railroad Company transferred this claim to the claimant, then such assignment is void by section 3477,

Revised Statutes of the United States. By this statute it is provided:

> That all transfers and assignments made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authority for receiving payment of any such claim, or any part or share thereof, shall be absolutely void unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of the claim, the ascertainment of the amount claimed, and the issuing of the warrant for the amount thereof.*

It is sufficient to call the attention of the court to the propositions laid down in the case of *Goodman* vs. *Niblack* (102 U. S. R., 556), upon this point. It is said by the court (p. 559):

> The statute has several times within the last few years received the consideration of this court. (*United States* vs. *Gillis*, 95 U. S. R., 407; *Spofford* vs. *Kirk*, 97 *id.*, 484; *Erwin* vs. *United States*, *id.*, 392.)
>
> It is understood that the circuit court sustained the demurrer under pressure of the strong language of the opinion in *Spofford* vs. *Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration or the principle there laid down. That was the case of a transfer or assignment of a part of a disputed claim then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs laid down in that opinion, and in others referred to, are mainly two:
>
> First, the danger that the rights of the Government might be embarrassed by having to deal with

several persons, instead of one, and *by the introduction of a party who was a stranger to the original transaction.*

Second, that by a transfer of such claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to all of such improper influences in prosecuting the claim before the Departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the Government and not the parties to the assignment.

Such an assignment as the court must find to sustain the title to the claimant by an assignment is open to two of the objections thus clearly set forth in the opinion of this court in *Goodman* vs. *Niblack, supra.*

First by the introduction of a party who was a stranger to the original transaction. If there was a perfect consolidation or amalgamation of these several corporations, then there can be no question that the new corporation was a new and distinct entity, and as such "a stranger to the original transaction."

Again, such an assignment may well be objected to on the ground set forth in the second paragraph of the above opinion as in contravention of the policy which is embodied in section 3480 of the Revised Statutes, which provides as follows:

SEC. 3480. It shall be unlawful for any officer to pay any account, claim, or demand against the United States, which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted,

encouraged, or in any manner sustained the late rebellion, or in favor of any person who during such rebellion was not known to be opposed thereto, and was distinctly in favor of its suppression.

That a corporation is subject to the provisions of this enactment is clearly shown on the authority of the case of the *Chesapeake and Ohio Railroad Co.* vs. *The United States* (20 C. Cls. R., 49).

It is found as a fact that after May 31, 1861, the Alabama and Tennessee Rivers Railroad Company carried the mail for the Confederate States Government.

VI. THE BURDEN OF PROOF TO SHOW THAT THE CLAIMANT OR THE ALABAMA AND TENNESSEE RIVERS RAILROAD COMPANY DID NOT RECEIVE THE PAY FOR THE SERVICES SUED FOR RESTS UPON THE CLAIMANT AND IT HAS FAILED TO SUSTAIN THE SAME.

The claimant's second assignment of error is:

> Error in holding that the burden of proof under said act of March 3, 1877, was upon the claimant to show that its claim had not been paid by the Confederate Government, whereas the court should have held that the burden of proof upon that issue was upon the United States, to prove that the claim had been paid.

The case at bar was decided by the ruling in the *Blount Case* (21 C. Cls., R. 274–279). The language of the court in that case on this point is as follows:

> A second act (of the Confederate Congress), dated September 27, 1862, directed the Postmaster-General to pay all such claims ascertained by him to be due to loyal citizens of the Confederacy. In pursuance

> of these acts $502,017.19 was paid out upon such claims prior to September 30, 1863, but to whom does not appear. In *Hukill's Case* (16 C. Cls., R. 562), and in other following cases, the court held that this action on the part of the Confederate Government raised the presumption that all claims which came within the requirements of these acts were paid. The court still adheres to that opinion. This ruling still imposes upon the claimant the difficult task of proving that he has not been paid.

It is insisted that there was no error in so holding, for the following reasons:

First. The law of March 3, 1877, was an enabling act, and all the requirements of such an act must be fulfilled by those claiming its benefits. The liability of the United States to pay this sum of $375,000 was assumed by Congress only upon a condition that the claims which have been paid by the Confederate Government shall not be again paid. That condition requires the negative, or nonpayment by the Confederate Government, to be proved before the liability of the United States attaches, or the right to recover from the United States is complete.

In *Wilder* vs. *Cowles* (100 Mass., p. 487), it was held that—

> The burden upon the plaintiff is coextensive with the legal proposition upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition.

In this case the legal proposition upon which the claimant's right to recover is based, rests wholly upon nonpayment of its claim by the Confederate Government.

Second. It is not disputed that this claim is one of those for the payment of which the Confederate statute of September 27, 1862, was passed. The only purpose of that act was to pay claims of this kind. In pursuance of that act the sum of $502,017.19 was paid by the Confederate postmaster-general (see *Blount's Case, supra*) prior to September 30, 1863. These payments may have been in full of all the claims of that kind. If not, the presumption of law is that payments were continued after that date until all claimants were paid. The act of the Confederate Congress of September 27, 1862 (page 15 of the Record), directed the postmaster-general *to proceed to pay* to the several claimants the sums respectively found due, etc.

The well settled legal presumption is that the directions and requirements of a law have been obeyed. Disobedience and disregard of a law on the part of a public official is never presumed, it must be proved. The postmaster-general was directed to pay these claims, and the presumption of law is that he did pay them. The right of claimant to recover in this case is based upon the assumption that the postmaster-general of the Confederate States failed to obey the law of September 27, 1862. A right founded upon the failure to observe or execute a law throws upon the plaintiff the burden of proof that the law was not obeyed.

Greenleaf on Evidence (sec. 40) says:

> In fine, it is presumed, until the contrary is proved, that every man obeys the mandate of the law and performs all his official and social duties.

Justice Story, in 12 Wheaton, U. S. R., page 69, says:

> It (the law) presumes that every man in his private and official character does his duty until the contrary is proved.

"Where a person is bound to do a certain act the performance of it will be presumed unless the contrary is proved," is a doctrine laid down in 19 Johnson's Reports, page 345.

The same rule is also declared in *Schauber* vs. *Jackson* (2 Wendell's Rep., page 14); *Clap* vs. *Bromaghan* (9 Cowen's R., page 530).

It was held in the case of *Williams* vs. *The East India Company* (3d East's R., page 193), that "where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in the pleading." The presumption of law is that the Postmaster-General of the Confederate States, in the performance of an official duty imposed by the Confederate Congress, paid these claims.

In Greenleaf on Evidence (sec. 78) this rule is stated:

> To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case.

We conceive this doctrine to also hold good where the suit is by virtue of a special statute which in its terms grounds the right of action upon a negative allegation.

Considering the important character of the proviso in the act of March 3, 1877, it may be truly stated that the plaintiff's right of action in this case must be grounded upon a negative allegation, that allegation being that it has not been paid by the Confederate Government. It is the foundation and corner-stone of any right of action or recovery by virtue of this special statute of March 3, 1877.

The claimant recognizes the necessity for this, and hence the averment in its petition, "that this claim has not been paid in whole or in part by the Confederate States Government, or by any government or pretended government of any State."

The burden of proof is on the party to show a material fact of which he is best cognizant.

The Alabama and Tennessee Rivers Railroad Company, by whom the mails were carried according to finding of fact 11, page 7, did not consolidate with the other corporations forming the claimant corporation till February 8, 1867.

The court has a right to assume that the Alabama and Tennessee Rivers Railroad Company conducted its business affairs as such corporations ordinarily do, observing the common business rules of keeping books and accounts of its transactions. Whether the Alabama and Tennessee Rivers Railroad Company did or did not receive from the Confederate States the amount due it from the United States, as it was entitled under the acts of the Confederate States, it is plain that the knowledge of such fact was peculiarly within such corporation either in its books or the knowledge of its officers. This claimant, if it shall be determined under the findings to have legally acquired the entire property, must be assumed to have been

possessed of its books of account. In any event, the claimant may be said to be as well or better cognizant of the fact as to whether the Alabama and Tennessee Rivers Railroad Company had received the money for these services from the Confederate States.

In no sense can it be said that the United States possessed the means to determine this fact.

On page 45 of claimant's brief is copied what purports to be a letter of recommendation from Assistant Attorney-General Simons in relation to the purchase of certain alleged records of the Confederate States containing lists of payments made out of appropriations by the Confederate post-office department and the names of the parties.

The brief, page 46, says: "It thus appears that evidence on this point is within the reach of the Government," and then states certain action by Congress in this behalf, but which resulted in failure to appropriate a sum for the purchase.

The brief continues: "These resolutions, however, failed to pass, and hence it is that this claimant is now before this court seeking the long-delayed payment of its indebtedness."

To this it may well be replied that no such finding of fact appears in this record and no rule of this court allows the reading of letters, though contained in a public report in Congress, to establish a substantive fact not found by the Court of Claims, and if it did in this instance it would fail entirely to uphold the assertion of the claimant that the evidence "on this point is within the reach of the Government."

The assumption that this alleged record contains a word

as to the payment to the Alabama and Tennessee River Railroad Company is unfounded, as is also the statement of counsel that because of the failure to pass the resolution by Congress, this "claimant is now before this court seeking the long-delayed payment of this indebtedness." With as much propriety the defendant could urge that it was as open to this claimant as to the defendant to purchase these records, and thus make certain what it has omitted to do by the non-production of the books and accounts of the Alabama and Tennessee River Railroad Company or other competent proof.

The defendant, therefore, claims that under the facts of this case the claimant is equally or better cognizant of this material fact than the defendant.

Taylor on Evidence (sec. 347) says that where the subject-matter of the allegation is peculiarly within the knowledge of one of the parties, that party must prove it, and cites numerous authorities.

(See Lawson on Presumptive Evidence, p. 20, and cases cited; *Great Western R. R. Co.* v. *Bacon*, 30 Ill., 347 (1863.)

VII. In no event can claimant be entitled to recover pay after January 4, 1861, when the State of Alabama first "engaged in war against the United States."

When did the State of Alabama engage in war against the United States?

The appropriation act approved March 3, 1877, provides—

> That the sum of three hundred and seventy-five thousand dollars, or so much thereof as may be necessary, be appropriated to pay the amount due mail

> contractors for mail service performed in the State of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Texas, Tennessee, Virginia, and West Virginia, in the years 1859, 1860, 1861, *and* before said States respectively engaged in war against the United States.

An important question arises, therefore, as to when these States "respectively" engaged in war against the United States.

Inasmuch as Congress fixed no date when this fact took place, it is evident that it left the court to determine it.

The Court of Claims did not fix it in its "findings of fact."

This act was passed by Congress with knowledge that this court had already decided in the case of *The Protector* (12 Wall., 700), that the rebellion commenced in Alabama April 19, 1861, and that fact was to be fixed by some "public act of the political departments of the Government." Had Congress intended to recognize the day thus fixed by this court it would have been easy to have so done. The fact that it did not so fix it in term or necessary implication renders it reasonably certain that this act is not to be construed in the light of that decision. That the fact was to be fixed by the time when these States "respectively" engaged in war against the United States renders it equally certain that the court must look to the *acts* of each State in determining the question.

The defendant agrees thus far with the claimant.

The claimant, however, contends that the act of engaging in war is to be construed in reference to the carrying

of the mails and the assumed time of the cessation of such carrying by the United States, and the assumption of such office by the Confederate Government.

Upon this construction the defendant takes issue with the claimant.

The language of the act is plain and unambiguous. It refers plainly to the time when each State *actually* engaged in war against the United States.

That such was its intention is shown from the fact that it had, by a joint resolution, on March 2, 1867, incorporated in Revised Statutes, section 3480, prohibited the payment of any account, etc.

This view is in accord with the opinion of the Court of Claims in the case of the *Chesapeake and Ohio Railroad Company* v. *United States*. (20 C. Cls. R., 49, 65.) In this case, page 66, the Court of Claims found that the State of Virginia engaged in war against the United States April 17, 1861, two days prior to the date fixed by this court in the Protector case, *supra*. It is also in accord with the view of both the claimant and defendant. Finding VI of the case, page 16, recites certain historical facts and provides that "the parties to this case have agreed that the work entitled 'War of the Rebellion—Official Record of the Union and Confederate Armies,' now in course of publication by the Government of the United States, may be referred to in the hearing of this cause in this court, *and* an appeal in the Supreme Court, in the same manner as if the same had been incorporated in these findings."

The State of Alabama engaged in war against the United States as early as January 4, 1861.

Upon what is meant by engaging in war against the United States there seems to be no essential difference between the claimant and the defendant.

The authority of the United States over forts, magazines, and arsenals, provided in Article I, section 8, Constitution of the United States, is as follows:

> And to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other useful buildings.

The "like authority" is the "exclusive" authority provided in the first clause of the paragraph.

Such being the tenure of the United States, the attempt by a State with an armed force of its militia to deprive the United States of its exclusive possession is an act of war; being part of a general scheme of setting up a government hostile to the United States it must be engaging in war against the United States.

The claimant quotes as authority upon this point from the opinion in the Prize Cases (2 Black, 635).

The language of the court is

> Have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign.

It is agreed (p. 16) that Alabama, January 11, 1861, passed an ordinance of secession from the United States, and that on the 9th day of February became one of the States forming a "provisional government for the Confederate States of America."

It is thus agreed that as early as January 11, 1861, Alabama took the initiatory step of war against the United States by declaring its independence and casting off its allegiance.

The State of Alabama, seven days before the passage of the ordinance of secession, began war against the United States.

January 4, 1861, Mount Vernon Arsenal, the property of the United States, was taken possession of by the State troops of Alabama. (See report of J. L. Reno, captain, Ordnance, vol. 1, Record of the Rebellion, p. 327.)

January 5, 1861, the militia of Alabama seized Fort Morgan. (*Id.*, p. 327.)

A. B. Moore, governor of Alabama, notified the President of the United States of the seizure of Fort Morgan and Fort Gaines and the Mount Vernon Arsenal, anticipating the passage of the ordinance of secession. (*Vide* letter, p. 327–328, *id.*)

In the language of the Court of Claims in *Chesapeake and Ohio Railroad Company* vs. *United States* (20 C. Cls. R., p. 66)—

> By the subsequent ratification of the ordinance all these preparations for and declarations and acts of war and seizures of United States property were also ratified.

The formal occupation of Fort Gaines is reported by Lieut. C. B. Reese, United States Corps of Engineers, January 19, 1861, seven days after the passage of the ordinance of secession. (*Vide* Records of the Rebellion, vol. 1, p. 329, *id.*)

Possession was taken in "the name of the State of Alabama."

January 8, 1861, A. B. Moore, governor of Alabama, sent to the president of the convention of the State of Alabama a communication respecting a call on him by Governor Perry, of Florida, and asking aid from Alabama for troops to occupy forts of the United States. He closes his letter thus:

> It is believed at Washington, in South Carolina, and Georgia, as I am advised from high sources, that is not only the policy of the Federal Government to coerce the seceding States, but as soon as possible to put herself in position by re-enforcing all the forts in the States where secession is expected. I need not suggest the danger to Florida and Alabama that must result from permitting a strong force to get possession of these forts. (*Vide* Rebellion Records, vol. 1, p. 444.)

On the same page follow several communications respecting the same matter.

The attitude of the governor of Alabama is seen in a letter of January 28, 1861, from him to Brooks, president of the State convention. (*Vide* Rebellion Records, vol. 1, p. 445.)

Near the close of the communication this is found:

> Notwithstanding it now appears, from the authority above given, that no attack is to be made upon the forts at Pensacola, *now in the possession of our forces at that point*, I deem it inexpedient that all the troops should be withdrawn. It is important that we should be provided for any emergency that may occur, and that a sufficient number of troops should be drilled

> and ready to meet it. If the troops should all be withdrawn from Pensacola it may have a demoralizing effect upon them and upon volunteers generally, unless kept under orders at some other point. It would be more expensive to *the State* to transport them to some other position and keep them under arms than permit them to remain at Pensacola. The withdrawal of the troops from Pensacola might induce the belief among the Black Republicans *that resistance was not intended* if coercion were attempted on their part, and thus give encouragement to them.

February 3, 1861, Jere. Clemens wrote L. P. Walker, Montgomery, advising that—

> There is at Pensacola an immense quantity of powder, shot, and shells, which ought to be removed to the interior at the earliest possible moment. Where they now are they are constantly exposed to the danger of recapture, and if they are permitted to remain, one of Lincoln's first movements will be to concentrate a sufficient force at that point to retake them. (*Vide* Rebellion Record, vol. 1, p. 447; (*vide* the letter of Jefferson Davis, from Montgomery, February 22, 1861, Rebellion Record, p. 447.)

March 14, 1861, George Deas, acting adjutant-general, writes General Braxton Bragg, commanding troops near Pensacola, Fla.:

> Requisitions upon the States of Alabama, Mississippi, Louisiana, Georgia, and Florida have been made for troops to the number of 5,000, to be placed under your command, and it may be expected that a large proportion of this force will be reported to you in the course of the next ten days. (*Vide* Rebellion Record, vol. 1, p. 449.)

March 19, 1861, General A. B. Moore, of Alabama, writes L. P. Walker, Secretary of War, Montgomery, respecting an apprehended disturbance in the troops of his State on their transfer to the Confederate government, growing out of the question of the election of their colonel. He says:

> In a few days companies enough will be at Pensacola to constitute a regiment. Nine companies will be there to-morrow. (*Vide* Rebellion Record, vol. 1, p. 452.) (*Vide* also communications respecting supplies and their transportation, under dates of March 21, 22, and 23, 1861, *id.*, p. 453.)

March 25, 1861, S. Cooper, Adjutant-General, writes General Braxton Bragg, commanding provisional forces, Pensacola, that "the provisional forces called into service of the Confederate States for the defense of Pensacola Harbor are as follows: 1,000 from Alabama" (*vide id.*, p. 454), and the return of General Bragg's forces (p. 455 *id.*) shows 885 twelve-month volunteers, known as the First Regiment Alabama.

May 12, 1861, General R. E. Lee writes Col. T. J. Jackson, commanding, etc., Harper's Ferry, Va:

> The Fourth Regiment Alabama troops, from Lynchburgh, have gone to you, and I have ordered two others from same point" (Official Records, War of the Rebellion, Series 1, Vol II, p. 836).

May 21, 1861, mention is made of the Fourth Regiment Alabama at Harper's Ferry in report of George Deas, Lieutenant-Colonel and Inspector-General, C. S. Army, to Col. R. S. Garnett, Adjutant-General, Richmond, Va. (*id.*, p. 861).

It is assumed that because the United States adopted a policy of conciliation towards the States in rebellion of allowing the mails to be carried in the name of the United States in such States up to May 31, 1861, therefore there was an actual control of such carrying by the United States.

The history of the relations of the postal service in the earlier period of the confederacy will throw light upon the situation concerning which Congress was legislating in the passage of the appropriation act aforesaid. Reference is necessary to certain acts of the Confederate Government, found in the volume entitled Confederate Statutes at Large.

On the 11th day of January, 1861, a convention of the State of Alabama passed an ordinance of secession from the United States, and on February 4, 1861, such of the States as had passed like ordinances of secession assembled at Montgomery, Ala., and on the 9th day of the same month adopted a provisional government for the Confederate States of America. Alabama was one of these States.

The constitution of the Confederate States of America was adopted March 11, 1861.

By an act approved on the 21st day of February, 1861, a post office department was established with a postmaster-general for the Confederate States of America by the Provisional Congress (*vide* Confederate Statutes at Large, p. 33.)

On the 23d day of February, 1861, an act was passed entitled "An act to prescribe the rates of postage in the Confederate States of America and for other purposes" (*vide* p. 34).

The act of February 13, 1861, *supra*, was amended in many of its provisions.

March 15, 1861, an act was passed entitled "An act vesting certain powers in the Postmaster-General." Under this act the Postmaster-General was authorized to renew provisionally the contracts under which the postal service was then performed and to continue in office the postmasters and other officers. He was also authorized to advertise and enter into contracts for carrying the mail. Conveyance of mails, except by his authority, was prohibited, after such contracts would be entered into. By section 4 of the act it was provided as follows:

> SECTION 4. *Be it further enacted*, That the Postmaster-General have power to issue circular instructions to the several postmasters and other officers still performing service under the appointment of the United States, in order to enforce the rendition of the proper accounts and payment of the moneys collected by them per account of the United States, until the Postmaster-General shall have issued his proclamation announcing that the former service is discontinued, and is replaced by the new service organized under the authority of this Government.

On May 9, 1861, the Provisional Congress passed an act entitled an act to amend "An act vesting certain powers in the Postmaster-General, approved March 15, 1861." By the provisions of this act, it was provided that the Postmaster-General take *entire* charge of the postal service, after a date to be named in a proclamation to be issued by him for that purpose. He was empowered to annul contracts, to discontinue or curtail the service.

It was by virtue of these several provisions, that the Postmaster-General of the Confederate States made the several reports and issued the several orders set forth in Finding II of the transcript of the record, on pages 8 to 14 inclusive. On the 13th day of May, 1861, the Postmaster-General of the Confederate States fixed the 1st day of June, 1861, as the time when he would assume the entire control of the postal service. Fourteen days after he had so announced his intention, the Postmaster-General of the United States, acting under the authority of an act of the Congress of the United States, approved February 28, 1861 (12 Stats. L., 177 and 178), namely, on the 27th day May, 1861, ordered the postal service in several States, including Alabama, to be suspended after the 31st day of May, 1861.

The report of the Postmaster-General of the Confederate States (p. 8), made April 29, 1861, recommended that the Confederate Congress give his department "at once authority to assume control of our postal service."

In accordance with such recommendation, without doubt, the act of March 15, 1861(Confederate Statutes at Large, p. 66) was passed.

Section 4 provided—

> That the Postmaster-General have power to issue circular instructions to the several postmasters and other officers still performing services under appointment of the United States, in order to enforce a rendition of the proper accounts and payment of moneys collected by them per account of the United States, until the Postmaster-General shall have issued his

> proclamation announcing that the former service is discontinued and it is replaced by the new service organized under the authority of this Government.

The report of the Postmaster-General of the Confederate States mentions two circulars issued by him to persons engaged in the postal service. It is noticeable that *no dates are given to these circulars.*

The only evidence upon the date of the circulars is inferential.

In his report of April 29, 1861, the Postmaster-General says:

> Soon after entering on my duties I received letters of inquiry from postmasters, mail contractors, etc.
>
> In reply to the inquiries of contractors I prepared and sent them circular letter No. 2.
>
> In answer to postmasters, circular letter No. 3, a copy of which is also annexed (marked Appendix E), was prepared and sent to all postmasters, etc.

The act creating the Post-Office Department was passed February 21, 1861, and there is a strong probability that the circulars were sent soon after that date.

Referring to the policy dictating these circulars (p. 9) the Postmaster-General said:

> And when that policy was determined on it was not known that actual hostilities would occur; but it was *then* supposed to be possible that our separation from the United States might be peaceably effected, etc. I have no power under existing laws to assume control of our postal service before the suspension of it by the United States. *If* I had possessed *that power* I should before this have exercised it. And now that *active hostilities have commenced*,

> and as we need not anticipate being separated from our sister Southern States, or having our correspondence with them interrupted for any great length of time by being under different governments, I recommend that the Congress give this department authority at once to assume the control of our postal service, and that it forbid the continuance of such service under the authority of the United States.

From the date of the secession of Alabama and the organization of the provisional government of the Confederate States, the control of the United States over the postal service in that State must necessarily have been little more than nominal. With the State troops of Alabama actually in hostile array against the United States, and with the seat of the provisional government at Montgomery in that State, any postal service carried on by the Alabama and Tennessee Rivers Railroad Company must have been in fact for the benefit and under the control of the rebel government. Contrary to the view of counsel for the claimant, the Confederate Postmaster-General deemed that such a state of war existed before April 29, 1861, as warranted him in assuming official, when he must have already had actual, control of the postal service.

The official announcement by the Postmaster-General of the United States of a discontinuance of the postal service was little more than the recognition of a fact long since existing.

Suppose the Postmaster-General of the United States at any time after the passage of the ordinance of secession by the State of Alabama by himself or subordinate had desired a personal inspection of this particular route, can

it be considered that he would have been allowed so to do? Could the Government of the United States have had any actual control of postal matters on this railroad?

The defendant contends not.

If, therefore, it be assumed that the contention of the claimant is correct, that the words "engaged in war against the United States" are to be construed in relation to the postal service, it has no ground for recovery after the passage of the ordinance of secession of Alabama, viz, January 11, 1861.

For these reasons it is submitted that the judgment of the Court of Claims should be affirmed.

JOHN B. COTTON,
Assistant Attorney-General.

SUPREME COURT U.S.
FILED
JAN 4 1887
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE SELMA, ROME AND DALTON RAILROAD COMPANY, appellant,
vs.
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BRIEF ON BEHALF OF THE UNITED STATES.

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BRIEF ON BEHALF OF THE UNITED STATES.

Before proceeding to a consideration of the errors specifically assigned by the appellant, the defendant asks leave to suggest want of jurisdiction in the Court of Claims.

This question has been passed upon, in several cases, by the court assuming jurisdiction in favor thereof. (*Henkill's Case*, 16 C. Cls. R., 562; *Hoffman's Case*, 17 C. Cls. R., 55; *Mordecai's Case*, 19 C. Cls. R., 11; *Blount's Case*, 21 C. Cls. R., 274.)

Although some cases in which the rights of *ante bellum* mail contractors are involved have been appealed, the question presented under the pleading and facts in this case has not been raised or decided by this court.

Reference to the petition shows that the claim of the company relies on the rates of compensation for carrying mails from the 1st of January, 1861, to the 31st day of May, 1861, under a regular contract, which right had

accrued by the act of Congress of March 3, 1877, hereinafter referred to.

The debt was due and payable on the 31st day of May, 1861. By this record no claim for payment appears to have been made until after March 3, 1877.

By joint resolution of Congress of March 2, 1867 (Rev. Stat., 3480), it was made unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; or in favor of any person who, during said rebellion, was not known to be opposed thereto, and distinctly in favor of its suppression, &c. This joint resolution was mandatory upon and related only to the disbursing officer of the Government.

Unless there was some special legislation or some peculiar condition of public affairs which interfered with or suspended or modified the course of procedure, the Court of Claims was open to all persons seeking to enforce claims founded upon any contract, from the time of performing of this service up until the 3d of March, 1877.

Was there any reason why the contracting party could not have enforced whatever right it had? The general jurisdiction of the court (find in chapter 21 of the Revised Statutes), amply provided for the hearing and determination of all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract with the Government, or upon any claim referred by either house of Congress.

The limitation to this jurisdiction (act of March 3, 1863) provided that every claim should be forever barred unless the petition setting forth a statement of the same be filed in the court or transmitted to it within six years after the claim first accrued. That statute is still in force.

If it is said that flagrant hostilities existed, and commercial intercourse interrupted and stopped, and indulgence to suitors is recognized, it may be answered that that indulgence ceased long prior to the institution of this suit.

The claim set up in this petition is here of the first instance; it was not transmitted to the Department under the act of June 25, 1868; it is therefore not within the direct effect of the cases cited above, as we shall hereafter see. The petition avers in ordinary language that the petitioner is loyal. The necessity for this allegation, if there ever was such necessity, existed as strongly in 1861 as it did at the time of the filing of this petition.

The power of the Court of Claims is, then, subject to the limitation and restrictions of the jurisdictional clauses referred to, unless it has been extended by legislation.

In Henkill's Case (*supra*) the claim was presented to an auditor. By the rule laid down in Lippitt's Case (U. S.) the Court of Claims had jurisdiction, because the case had been sent to them from a Department; this jurisdiction cannot be questioned. The court said in Henkill's Case they could hear and determine all claims founded upon any law of Congress. But no bar of time interposed to prevent relief. And so, as far as principle is recognized in the other cases, digested, and so easily commentated upon by the learned judge delivering the opinion in the case of *Blount* vs. *The United States*. (21 C. Cls. R., 274.)

II.

Coming then to the provision in the act of March 3, 1877, the true intent and purpose of this act was to remove the disability imposed by the act of 1863, embodied in section 3480 of the Revised Statutes, upon officers of the Government to pay amounts due mail contractors. These claims were, or ought to have been, before the proper accounting and disbursing officers. There has been, as far as appears, no difficulty of adjustment, but a bar payment. There was no recognition of a slumbering debt; there was no intention of conferring a right to sue upon any creditor. The right of action given to the executive officers of the Government was absolutely exclusive of other interference.

III.

The assignment of specific errors is that the court erred in holding that the presumption that claims for postal service covered by the terms of certain Confederate statutes had been paid, and that the burden of proof under the act of March 3, 1877, was upon the claimant to show that his claim had been paid by the Confederate Government.

It is admitted upon the part of the defendant that the object of the statute was to pay the amounts due to mail contractors for mail service in Southern States before those States had engaged in war against the United States. Some of these claims had originated before rebellion was contemplated by the mass of the people. Certainly it cannot be presumed that the individuals for whose benefit the act was passed and who had performed their contract obligation had at the time an intention of disloyalty.

The history of these times, and of the connection of the Alabama and Tennessee Rivers Railroad Company with postal service is fully set out in the findings of the Court of Claims. By the acts of the Confederate Congress of August 30, 1861, and September 27, 1862, provisions were made for the payment of amounts due to the mail carriers under contracts made with the United States Government, appropriations were made for the payment of these claims which were not exhausted. (*Blount* vs. *United States*, 21 C. Cls. R., 274.)

The decision in this case governs the case at bar (Tr. p. 17).

The statute of 1877 is a statute of grace. There is not involved any question of interpretation by reason of a difference between the enacting clause and the proviso. There was a naked direction to pay these carriers if they had not been paid by the Confederate Government. The burden upon them, seeking compensation, was to show they had performed the service and that they had not been paid therefor by either the original contracting government or an antagonistic government, which had assumed these obligations. It is not a question of release; there is no analogy here to the case where a claim against one has been fairly established and proof of payment is necessary to make good the contention of a resisting debtor. This is not, on the part of the United States, a defense of payment. The onus is with the petitioner all through. The force of the statute is that he shall be paid if he has not been. He must, as he can, show that he has not been.

Of course it is a matter of probability. The corporation which carried these mails was a company transacting

business in the State of Alabama, which was notoriously doing business in a territory under the control of a Government practically foreign to the United States Government. Its communications were direct with the headquarters and capital of that independent State. It is not even matter of conjecture as to their means of knowledge in connection with what was public business. The acts of the Confederate Congress with reference to mail communications were public, notorious, and known of all men. Had there not been assurance to a great corporation of compensation for expenses, service, these parties would have refused to perform the same unless compelled by great force, and of this there is no pretense.

But, if the very terms of the act did not require this affirmative proof on the part of the claimant, the reasoning of probability is all with the defendant.

> Probability is likeliness to be true; the very notation of the word signyfying such a proposition for which there be agreements or proofs to make it pass or be received for true. * * * Probability being to supply the defect of our knowledge, and to guide us where that fails, is always conversant about propositions whereof we have no certainty, but only some inducements to receive them for true.
>
> The grounds of it are in short: * * * First. The conformity, if anything, with our own knowledge, observation, and experience.

Locke, quoted Ram. on Facts, 107:

> It is an ordinary inference says an able writer upon this subject, that the action of business men will be conducted with business regularity. * * *
>
> If a party should present claim of old date to a

solvent person, that the claim has lain dormant for years subjects it to much prejudice.

A claim which a party does not undertake to realize he discredits.

Wharton Law of Evidence, sec. 1320; *Lawson on Presumptive Ev.*, 356.

It appears from the record (Tr., p. 16) that the Alabama and Tennessee Rivers Railroad Company carried the mails for the Confederate States Government between Selma and Talladega, in the State of Alabama, in the year 1861, and that said mail service commenced immediately after said company ceased to carry the mails of the United States.

The company was thus in receipt of compensation from the Confederete Government at the very time that Government was tendering payment for services theretofore performed. At the time payment was demanded for these latter performances the gracious paymaster was standing with open hand to welcome the suitor. This corporation did not have to demand. It refused the offer of a just payment. If it had been a landlord and accepted the payment of a quarter's rent, and receipted for it, the presumption would be that all former rent was paid. (*Brewer* v. *Knapp*, 1 Pick., 337; *Crampton* v. *Pratt*, 105 Mass., 255.)

Where a person is entitled to receive money the presumption obtains that he did receive it. (*Decker* v. *Livingston*, 15 Johns., 479.)

But beyond all this the probabilities of payment by the Confederate Government are almost certain, from the fact that the petitioner has not attempted to negative such payment. The business of corporations is conducted by

numerous persons. They have auditors, treasurers, directors, clerks; their accounts are regularly kept; their receipts and expenditures can well be shown. The non-acceptance of the offer of the Confederate Government and the non-receipt of this money could have been shown to a demonstration.

Bespectfully submitted.

ROBERT A. HOWARD,
Assistant Attorney-General.

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Office Supreme Court U. S.
FILED.
MAR 28 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE SELMA, ROME & DALTON RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES.

No. 12.

ADDITIONAL SUGGESTIONS OF APPELLANT.

The question has been raised on the part of the Court whether the appropriation of $375,000 made by the act of March 3, 1877, 19 Stat. 362, under which this suit is brought, does not constitute a special and limited fund from which alone such claims can be paid, and from which, if insufficient, they can only be paid *pro rata*, and whether, therefore, a suit for its distribution must not necessarily be one in equity, to which all claimants should be made parties.

As connected with this question it has also been asked what would be the effect of the rendition by the Court of Claims of judgments to the extent of $375,000, and whether after judgments had been rendered to that amount, any further ones could be rendered.

As responsive to these points, appellant submits the following suggestions:

1. The act of March 3, 1877, 19 Stat. 362, was not framed with any idea of a *pro rata* distribution of the $375,000 thereby appropriated. Its language is, "That the sum of $375,000, *or so much thereof as may be necessary*, be appropriated *to pay the amount due* to mail contractors for mail services performed," etc.

Evidently it was thought that $375,000 would be ample to cover all claims. The object for which the appropriation is made is "to pay the amount due to mail contractors," thus recognizing the balances on those contracts as existing contract obligations of the Government. This shows that there was no intention on the part of Congress to limit the amount which might be claimed to the sum appropriated, but to recognize and allow a class of claims as existing obligations of the Government, and to set apart a sum estimated to be sufficient, or more than sufficient, to discharge them in full. Had there been an intention of "pro-rating" the debts of the Government,—a policy believed never to have been adopted in regard to any national obligations,—the intention would have been expressed on the face of the act.

2. At the time this act of 1877 was passed, section 5 of the act of June 20, 1874, was in force, which provided as follows (18 Stat. 110, 111):

"That from and after the 1st day of July, 1874, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury. * * * *And provided further*, That this section shall not operate to prevent the fulfilment of contracts existing at the date of the passage of this act;

and the Secretary of the Treasury shall, at the beginning of each session, report to Congress with his annual estimates, any balances of appropriations for specific objects affected by this section that may need to be re-appropriated."

Prior to the time when by the provisions of this section the appropriation of $375,000 made by the act of 1877 could be covered into the Treasury, the following was enacted by act of June 14, 1878, 20 Stat. 130:

"That so much of section 5 of the act approved June 20, 1874, as directs the Secretary of the Treasury at the beginning of each session to report to Congress with his annual estimates any balances of appropriations for specific objects affected by said section that may need to be re-appropriated, be, and hereby is, repealed. And it shall be the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of said section that may be brought before them within a period of five years. And the Secretary of the Treasury shall report the amount due each claimant, at the commencement of each session, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration: *Provided*, That nothing in this act shall be construed to authorize the re-examination and payment of any claim or account which has been once examined and rejected, unless reopened in accordance with existing law."

The same provisions were carried with but little change into the act of July 7, 1884, 23 Stat. 254, constituting the existing law on that subject, which provides:

"That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole

or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department."

Under these provisions of law it was the duty of the proper accounting officers of the Treasury to receive, examine and consider all claims arising under this act of 1877 after its amount had been exhausted, and it was the duty of the Secretary of the Treasury to report all claims allowed by the accounting officers to Congress.

3. Had it been the intention of Congress to authorize under any circumstances a *pro rata* payment only of these claims, that intention would have been expressed, as it was, for instance, in relation to claims arising out of the illness and burial of the late President Garfield, as to which, after constituting a board of audit, and making an appropriation, it was enacted, "That the aggregate amount of awards made by said board shall not exceed the amount hereby appropriated." (Act of August 5, 1882, sec. 6, 22 Stat. 284.)

4. These suggestions also answer the question as to the effect of the rendition of judgments by the Court of Claims up to $375,000 upon claims subsequently coming before the Court. The limit of $375,000 upon the appropriation has no effect upon the justice and validity of the claims themselves as acknowledged by that act to be "due to mail contractors for mail service performed." They are rec-

ognized as valid to their full amount. It could hardly have been expected that Congress would appropriate an absolutely unlimited sum for the payment of *any* class of Government obligations. In this instance it gave the next thing to it by appropriating a sum evidently regarded as ample to cover all demands which might be presented.

No reason appears, therefore, why the Court of Claims should not give judgment for all amounts proved to be due within the description of the act, whether such amounts aggregate less or more than $375,000.

Respectfully submitted.

GEORGE A. KING,
Attorney for Appellant.